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Nos. 94-1614, 94-1631 and 94-1985

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IN THE

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN, *Petitioner,*

v.

CITY OF NEW YORK, et al., *Respondents.*

STATE OF OKLAHOMA, *Petitioner,*

v.

CITY OF NEW YORK, et al., *Respondents.*

UNITED STATES DEPARTMENT OF COMMERCE, et al.,
Petitioners,

v.

CITY OF NEW YORK, et al., *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS

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STATEMENT

In connection with the 1990 decennial census, the Census Bureau conducted a massive, long-planned program to determine the extent to which the census differentially undercounts minorities and to develop statistically adjusted census data to correct that differential undercount. In 1991, after completing its work and reviewing the accuracy of the uncorrected and the corrected census counts, the Bureau concluded that correction would increase the accuracy of the census and that the corrected data should be reported as the 1990 census. The Secretary of Commerce overruled the Bureau and decided instead to use the uncorrected data, even as he acknowledged those data contained a differentially severe undercount of minorities that correction would largely eliminate. Respondents challenged that decision as violative of constitutional guarantees of equal representation.

The district court, after a thirteen-day trial, agreed with respondents that the corrected data had been shown to be more accurate for most purposes. But the court determined that separation of powers concerns required judicial deference to the Secretary's decision, which, in the court's view, could be overturned only if arbitrary and capricious; moreover, the court tested the rationality of that decision only against the Secretary's own guidelines for the adjustment decision and not against the constitutional standard. Because the court found that the guidelines permitted the Secretary to ignore all comparisons of accuracy favoring the adjusted counts if the Secretary could identify any comparison as to which there remained uncertainty, the court ruled in favor of the Secretary. On appeal, the court of appeals rejected the standard of review employed by the district court. The court of appeals accepted the district court's finding that the corrected data were more accurate for most purposes and the uncontested fact that the uncorrected data reflected a differential undercount of minorities that was substantially ameliorated

by the proposed correction. The court of appeals concluded that the Secretary's decision was subject to heightened scrutiny, both because of the nature of the constitutional right impaired and because the decision against correction has a disproportionate impact on a suspect classification (members of minority groups).

Before this Court, petitioners attack the court of appeals' conclusion explicitly and the district court's findings implicitly. At the heart of petitioners' argument lies the claim that the uncorrected census counts are, or at least probably are, as accurate as or more accurate than the corrected counts. To accept that claim means more than just to review and reject the district court's findings of fact. To accept it means to accept as well that the Bureau labored for a decade to find a means of correcting the census; carefully constructed, tested and implemented such a mechanism; reached the conclusion that the mechanism had worked and recommended that the corrected counts were more accurate and should be reported as the 1990 census—and yet that the Bureau was fundamentally mistaken, that the Bureau's correction would have degraded rather than enhanced census accuracy and that only the intervention of the Secretary of Commerce, Robert A. Mosbacher, who disavowed any statistical expertise, saved the census from the Bureau's ill-considered plans. To accept petitioners' argument means, moreover, to accept an approach to defining and deciding questions of accuracy that is without precedent in the history of the United States census, without justification in terms of the constitutional and statutory uses to which census data are put, and without support in logic or law—an approach, indeed, that the United States repudiated before the court of appeals.

Petitioners' account of what the case involves is fundamentally defective, and their discussion of the court of appeals' opinion and the governing law, resting on a flawed foundation, is correspondingly in error. Understanding those

defects and their sources in the Secretary's decision requires, in the first instance, an accurate account of the problem of differential undercount and of how the Bureau addressed its resolution.

A. The Decennial Census

1. Two petitioners—the United States and the State of Wisconsin—refer, variously, to "the 200-year practice of relying upon unadjusted figures to apportion Representatives among the States", U.S. Br. 17; *see also id.* at 23, 31, and to "the 200-year practice of actual enumeration", Wisc. Br. 18, 23-24.[1] Similarly, in his decision against adjustment the Secretary said that adjusting the census would mean "abandon[ing] a two hundred year tradition of how we actually count people." Pet. App. 138. No petitioner has offered any more detailed account of that "practice" or "tradition."

Historically, census-taking in the United States does not reflect the monolithic tradition petitioners suggest. For example, until 1960 most residents were counted through a door-to-door enumeration: Bureau employees travelled across the country, census forms in hand, and recorded information reported to them by census respondents. By 1960, however, the expanding size of the country's population had made door-to-door enumeration prohibitively expensive and time-consuming, and the Bureau had come to recognize that for most respondents the old technique did not secure the most accurate information. The Bureau turned to a mailout and mailback of census questionnaires, and the 1960 census was

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[1] References to the Brief for the Federal Petitioners are given as "U.S. Br."; references to the Brief of Petitioner State of Wisconsin are given as "Wisc. Br."; references to Petitioner Oklahoma's Brief on the Merits are given as "Okla. Br."; references to the joint appendix are given as "Jt. App."; and references given as "Pet. App." are to the appendix to the petition in No. 94-1614.

the first in which the majority of the population was counted through a technique that involved no direct contact between Bureau employees and census respondents.[2] Censuses since 1960 have relied principally on the mailout/mailback of questionnaires, with door-to-door enumeration a second step in the census process.

Acceptance of mailed questionnaires is only the most obvious of the many ways in which the census has grown more sophisticated since 1790. Use of statistical adjustment is another refinement. It is simply untrue that the census data have never been statistically adjusted—in that sense, there is either no "two hundred year tradition of how we actually count people" or "actually count[ing] people" is a more elastic concept than the casual reader might assume. And it is equally untrue that the apportionment of the House of Representatives has never been based upon statistically adjusted census data. There is no "200-year practice of relying upon unadjusted figures to apportion Representatives among the States."

In 1970, for example, the Bureau conducted a sample reinterview survey of 13,546 housing units that enumerators had initially reported to be vacant, determined that 11% of those units were actually occupied and adjusted the decennial census accordingly. To adjust, the Bureau generalized the results of its survey to all housing units that had initially been reported vacant, deeming 11% of them occupied. To generate populations for the units deemed occupied, and characteristics for the generated populations, the Bureau used a type of probabilistic technique known as statistical imputation: each unit deemed occupied was assigned the same number of residents, with the same characteristics (race, sex, age and so on), as the unit that followed it in the Bureau's processing

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[2] Margo J. Anderson, *The American Census: A Social History* 201 (1988).

sequence. On the basis of imputation, the Bureau added 1,069,000 persons to the 1970 census count. Tr. 260, 268-271; PX 474 at 11-14. The same decennial census was also adjusted in one part of the country by the Post-Enumeration Post Office Check. In rural Southern areas where the Bureau found that housing units had been omitted from its address lists, it asked the Post Office to recheck the Bureau's lists, conducted a sample of interviews for omitted addresses and generalized the results throughout the region to add another 484,000 persons. Tr. 269-273; PX 474 at 15-16.

In 1980, where the Bureau had no other source of information about the occupancy status of housing units, statistical imputation was used to generate a status (occupied or vacant) and then, for units imputed to be occupied, to generate resident populations and their characteristics. Imputation added to the 1980 counts 762,000 persons in housing units for which occupancy status was unknown. Tr. 273-274. The result affected the apportionment of the House of Representatives, shifting a seat from Indiana to Florida. Indiana sued to reverse the outcome, *Orr v. Baldrige*, No. IP 81-604-C (S.D. Ind.), but the Bureau's decision to proceed with imputation (and the consequent effect on apportionment) was upheld. Tr. 274, 1289-1291, 1843.

2. Recognizing that the Bureau uses statistical adjustment only hints at the complexity of "how we actually count people." When the Bureau imputes an occupancy status to a housing unit for which no occupancy status is actually known, when the Bureau then imputes to that unit a number of residents and imputes to them particular characteristics, the Bureau is surely creating a datum that, in one sense, can be described as an error: it is very unlikely that the particular unit that, as a result of imputation, is deemed occupied by three persons (a 30-year-old white male, a 29-year-old white female and a 5-year-old white female), is actually occupied

by three persons with those characteristics. Yet imputation is in keeping with the Bureau's overall approach to the census.

That approach begins with the recognition that the census is inevitably laden with error. The National Academy of Sciences has observed, "The evidence is overwhelming that no counting process, however diligent, will in fact enumerate everyone." PX 2 at 17. A survey of a quarter-billion persons cannot achieve perfect accuracy, locating every person exactly where he or she resided on Census Day.

Census errors are of two kinds—gross omissions (persons who were not counted at all but should have been or who were not counted at the right location) and erroneous enumerations (persons who were counted but should not have been, because they were born after or died before Census Day or because they were not residents of the country or because they do not exist, persons who were counted two or more times and persons who were counted at the wrong location).[3] Tr. 80-83; PX 54, App. 3 at 1-2. Those kinds of errors are endemic to the census: for example, in 1991 the United States General Accounting Office ("GAO") estimated that "the 1990 census contained a minimum of 14.1 million gross errors and perhaps as many as 25.7 million errors, depending on how broadly census error is defined." PX 16 at 1. GAO's minimum estimate is based on 9.7 million gross omissions and 4.4 million erroneous enumerations.[4] *Ibid.* The Secretary

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[3] When a person who was a resident of the country on Census Day is counted just once, but at the wrong location, there is both a gross omission (at the location at which the person should have been counted) and an erroneous enumeration (at the location at which the person is actually counted).

[4] GAO also pointed out that that level of error represented a substantial degradation in data quality from 1980. Using the same "minimal definition of census error," GAO found that the 1990 census contained far more error (14.1 million errors in a count of about 248.7 million) than the 1980 census (7.8 million errors in a count of about

himself, in his decision, accepted as a "defensible" maximum estimate the Bureau's calculation of 19.1 million gross omissions and 13.1 million erroneous enumerations. Pet. App. 261. Earlier this year, the National Research Council estimated total error in the uncorrected 1990 census counts at about 20 million gross omissions and 16 million erroneous enumerations.[5] Thus, the amount of error in the uncorrected 1990 census is between 5.7 and 14.4 percent of the overall population figure.

Error arises at every step of the census-taking process. The Bureau begins the census with the construction of address lists for the mailout of questionnaires (and later follow-up by enumerators); irregular, unreported housing units (converted garages, subdivided apartments) are often missed. Tr. 108-111; PX 455 at 9; PX 456 at A001722. Mailed questionnaires are subject to loss or vandalism. Tr. 136-137. The complexity of the questionnaire and ambiguities in classifying individuals who reside temporarily at one or more addresses lead to both omissions and double-counting. Tr. 149; PX 464 at 163; PX 465 at 007701.

For housing units that do not respond to the mailed questionnaire, the Bureau deploys enumerators to conduct the door-to-door phase of the census called non-response follow-up. Pet. App. 327-328. In 1990, the Bureau had projected and planned for a mail response rate of 70%; in fact, the mail response rate was only 63%. Pet. App. 327. The lower-than-expected mail response rate placed unanticipated burdens on the Bureau's enumerators, the vast majority of them temporary, short-term employees. Tr. 132, 1823; PX 383 at 7; PX 458. Enumerators were instructed to make six attempts at contact, three in person and three by telephone, after which

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226.5 million). PX 16 at 7.

[5] National Research Council, *Modernizing the U.S. Census* 33 (1995).

they were permitted to obtain "last resort"[6] information from a person deemed "knowledgeable" by the enumerator. Tr. 161. Last resort information therefore came from neighbors, building superintendents, local mail carriers or local police officers. Tr. 161. By that stage of the process, the Bureau has no doubt that the quality of the information is of limited reliability. Tr. 1825-1827.

An example of the unreliability of last resort information is provided by results of the Bureau's "Pop 1" check. During the 1990 census the Bureau heard reports that enumerators were mechanically listing the populations of large numbers of housing units as one person, without any actual information to support their reports. Tr. 175. The Bureau rapidly created "Pop 1," an *ad hoc* check of housing units for which enumerators had reported single residents from last resort information; the Bureau found the counts in error in 44% of the housing units rechecked. Tr. 178; PX 473. "Pop 1" was limited to only 24 (of 447) district offices and covered only 128,000 housing units. Tr. 176-178; PX 473. But in a national survey of 1,000 one-person housing units counted during non-response follow-up, the Bureau found over 20% of the count in error. Tr. 180; PX 473. The Bureau did not adjust the counts on the basis of those results, concluding that it would rely instead on the more comprehensive post-enumeration survey that is the subject of this litigation. Tr. 180; PX 473 at 1.

That the decennial census has so much error does not mean that it is worthless. It does, however, suggest the complexity of defining what census error is and, indeed, what

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[6] Technically, "last resort" information was supposed to include "at least basic information on household member(s)", Pet. App. 328, but in the late stages of non-response follow-up, when Bureau offices began shutting down, even less thorough "closeout" data were accepted. Tr. 162-163.

the census itself is. The census is not a simple headcount of the national population. It is an estimate, and it is affected by the choice of techniques that go into its production. As Vincent Barabba, formerly Director of the Census Bureau, wrote in his book *The 1980 Census: Policy Making amid Turbulence* (1983) (with Ian Mitroff and Richard Mason):

> "The number that is accepted as [the] true population of the United States is merely a scientific estimate. This estimate is not a simple addition of all persons and only those persons directly enumerated by census enumerators. Indeed, the number of people in the United States cannot be confirmed by immediate experience. It is dependent on complex scientific and management models and processes that are designed to ensure the taking of an accurate census insofar as humanly possible."

PX 13 at 5. Similarly, Barbara A. Bailar, then Associate Director of the Bureau for Statistical Methodology, wrote in a 1983 paper, "Counting or Estimation in a Census—A Difficult Decision":

> "The issue is not really whether there should be counting or estimation; the real issue is how much estimation there should be. There has probably always been some estimation in the census."

PX 14 at 3; *see also* Tr. 1510-1515. The conventional formats in which the Bureau releases the best-known census data products obscure the extent to which the census is an estimate. The Bureau uses exact, unrounded numbers unaccompanied by estimates of error to describe the population: for example, the official, unadjusted 1990 census count of the national population is 249,632,692. Pet. App. 49. The Bureau also issues, for redistricting purposes, block-level census data. The happenstance that the Bureau uses those formats does not change the fact that, at both the national and block level, the counts are estimates.

Viewing the census as an estimate entails recognition that, for the purposes for which the census is conducted, many errors are random and thus offset one another. It would be misleading to characterize the unadjusted 1990 decennial census as about 10% error and to leave the matter at that. Much error appears only at the block level. Consider, for example, a person who is otherwise correctly counted but located in the census counts at the wrong address in a block adjacent to the one in which he or she should properly have been counted: both block counts are erroneous, but the larger unit that includes the two blocks (the census tract) is unaffected. At the block level, census counts are indeed highly inaccurate.[7] But as those counts are aggregated, random errors cancel: for example, the omission of one person who should have been counted is offset by the erroneous double-counting of another person in the same town. The census thus achieves greater accuracy at the higher levels of aggregation at which census data are actually used—from the local legislative district on up through the town, the county, the State and the nation. Tr. 1314-1316.[8]

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[7] Analysis of block-level inaccuracy in the uncorrected 1990 census did not take place until after the trial of this action. Recent Bureau research on the block-level error structure of the uncorrected census is discussed in National Research Council, *Modernizing the U.S. Census* 35-37 (1995).

[8] Because accuracy in census-taking depends upon development of a complex system for balancing error, rather than simply adding observations to produce a more complete "headcount," naive intuitions about the value of increasing resources are often mistaken. Making what is intended as a rhetorical point, Wisconsin writes:

> Hiring 400,000 enumerators should produce a more accurate census than employing 300,000, yet either level would seem constitutionally permissible. * * * Ten attempts at non-response follow-up should yield more accurate counts than six attempts, which should yield more accurate counts than four attempts.

The combined pattern of omissions and erroneous enumerations yields net undercount (or overcount, as the case may be), which is simply the difference between total omissions and erroneous enumerations at a particular level of aggregation. Tr. 90. Although omissions and erroneous enumerations can be treated as cancelling out one another at particular levels of aggregation (such as the nation as a whole), they are not distributed evenly (certainly not across the entire nation). Tr. 89-90. A net undercount of zero, therefore, cannot be taken as indicating an absence of census error at subordinate levels of aggregation nor an absence of differential undercount. Tr. 90-91. As GAO reported, "A focus on the *net* undercount obscures the true magnitude of the error in the census because, while millions of persons were missed by the census, millions of other persons were improperly counted." PX 16 at 1 (emphasis in original). Moreover, although some census error is random, much of it is not. It is systematic error that creates the differential undercount.

Wisc. Br. 22. Neither survey research in general nor census-taking in particular is so simple. There is no necessary reason to suppose that more enumerators or more attempts at non-response follow-up will increase *accuracy*. Either approach would surely add *responses*. But the fact of more responses does not translate unproblematically into the fact of increased accuracy. Beyond a certain point, additional responses are disproportionately likely to add error, because a disproportionate number of "late census additions" are erroneous enumerations. Tr. 1825-1827. The particular level of non-response follow-up selected by the Bureau—six attempts—may well represent the best balance of addition of new information and limitation of error in the interest of maximizing accuracy; it is not obvious a different balance would have increased accuracy. In fact, it is entirely plausible that in 1990 the Bureau did the best job possible of counting the population under the constraints of "traditional" means of conducting the census. The Bureau itself believed so, which is why it focused on adjustment, rather than expanding other census operations, as the vehicle to reduce differential undercounting.

3. When census error occurs systematically, that is, when the same causes consistently create the same types of error, aggregation does not help: there are no offsetting errors of the opposite type to improve accuracy. There is no dispute that the most serious source of systematic error in the census is the differential undercount of minorities. That differential undercount has been a feature of the census for a long time—probably for as long as the decennial census has been conducted. Tr. 1276. Because minorities are geographically concentrated, the differential undercount has consequences in terms of the fairness with which political power and governmental funds and services are allocated. Tr. 103-105; Jt. App. 79; Pet. App. 128-129.

When he announced his decision against adjustment, the Secretary estimated that in the 1990 census blacks had been undercounted by 4.8%, Hispanics by 5.2%, Asian/Pacific Islanders by 3.1% and American Indians by 5.0%, while non-blacks (a category that includes some Hispanics) had been undercounted by 1.7%, Pet. App. 138-139; thus, the black/non-black differential undercount was estimated to be 3.1. That estimate was in keeping with experience from other censuses and using other measurement techniques.

By one yardstick, demographic analysis (which provides a measure of the black/non-black differential at the national level), the black/nonblack differential has had the following notable constancy: in 1940, when the overall undercount (*i.e.*, for all residents, regardless of race) was 5.4%, the black undercount was 8.4% and the non-black 5.0%, for a differential of 3.4; in 1950, the overall undercount fell to 4.1%, but the differential rose to 3.8; in 1960, the overall undercount fell again, to 3.1%, and the differential rose again, to 3.9; in 1970, the overall undercount went down to 2.7%, and the differential went up once more to 4.3; in 1980, the overall undercount dropped to its lowest level, 1.2%, and the differential fell to 3.7; in 1990, by demographic analysis, the

overall undercount was up to 1.8%, and the differential undercount rose to its highest recorded level, 4.4. Tr. 195-199; PX 476; PX 477. Uncertainties in demographic analysis suggest that marginal changes in undercount rates should not be overemphasized; but the pattern of consistency in the differential undercount is a reliable indication that differential undercount is a real and persistent problem in the conduct of the decennial census. Tr. 883-887; PX 184; PX 197.

Demographic analysis does not permit analysis of undercount by local areas, such as States, nor does it give a separate figure for Hispanics. However, the Bureau's 1980 post-enumeration program and the 1986 test census in East Los Angeles confirmed a differential undercount of Hispanics and the concentration of differential undercounts of blacks and Hispanics in inner cities. Tr. 1277; PX 5, App. E.

4. Why differential undercount occurs is no mystery; it is an inherent consequence of the method currently used to conduct the census. Tr. 105-106. The problem is not that the census is badly conducted; the problem is that because of the social arrangements that govern an increasingly diverse and mobile population, the method used to count the population inevitably produces an undercount that is more severe among certain parts of the national population. Tr. 505-506. At each step of its conduct, the census-taking process, despite the Bureau's best efforts, systematically generates a differential undercount. Tr. 106-194.

Under the census-taking approach used in 1990 and for previous decennials, the first problem arises in the construction of the address lists used by the Bureau as the basis for the mailout of census questionnaires and, later, to determine the housing units from which no responses have been received and to which enumerators will be sent. Tr. 129-130. Minority households, disproportionately located in inner city neighborhoods, are more likely to be left off the address lists; they are also less likely to receive questionnaires mailed

out to them. Tr. 136. Minorities who do receive questionnaires are less likely to complete and return them, because of language difficulties and because the complex questionnaire is daunting for someone with less education or a more complicated family structure. Tr. 144-146. For the same reasons, even if the questionnaire is filled out and returned, it is more likely that it will contain errors than will the typical questionnaire filled out by a non-Hispanic white respondent. Tr. 146-151.

Because mail response rates are lower in inner cities, the census relies more heavily there on enumerator visits. Those areas are the ones where the Bureau encounters the greatest difficulty in hiring and retaining enumerators, and the enumerators who are hired are least likely to obtain information sought—because addresses in projects and irregular multi-unit structures are hard to find, because fear of crime discourages enumerators from aggressive interviewing, and because language problems impede interviewing. Tr. 164-165, 1825.

If an enumerator cannot get a response from a member of a household, the unit may be counted through the less reliable alternatives of "last resort" or "closeout" or treated as "non-data-defined." Tr. 160-163, 1825-1827. Bureau research on the 1990 census shows that "last resort" counts reflect serious undercoverage. Tr. 176-178; PX 473. In the 1990 census, minority households were more likely than others to be enumerated through "last resort" or "closeout" or treated as "non-data-defined." Tr. 171-174.

The persistence of a differential undercount does not reflect badly on the Bureau. In 1990, as in 1980, the Bureau made every effort to overcome those problems through expanded outreach efforts, but in 1990, just as in 1980, those efforts failed to reduce, let alone eliminate, differential undercounting. As the former Chief of the Bureau's Statistical Research Division, Kirk M. Wolter, stated at the trial of this

action, "In spite of all the Bureau's good efforts, and in spite of decades of work, in spite of billions of dollars over the many decades, the differential undercount has remained persistent, constant, almost intractable, at least intractable for the kinds of conventional enumeration methods the Bureau has utilized." Tr. 506.

B. Census Correction

1. Having long known of the existence of the differential undercount, the Bureau was aware in 1980 that the census that year reflected the same problem. Accordingly, the Bureau considered whether to correct the 1980 census to alleviate the problem. Tr. 1276.

Through Department Organizational Order 35-2A of August 4, 1975, the Secretary of Commerce had delegated to the Director of the Bureau authority to conduct the census as the Director determined. Tr. 1284-1285; PX 604. In 1980 Secretary of Commerce Philip A. Klutznick reaffirmed to Director Barabba that the delegation meant the determination whether to correct the 1980 census was to be made by the Director, which would prevent the appearance of partisanship in the decision. Tr. 1285-1286; PX 605.

The Bureau decided against adjusting the 1980 census, despite the differential undercount affecting it, because of technical limitations on each of the two techniques that might have been available for the purpose. Tr. 1282-1283. One possibility that the Bureau considered was adjusting on the basis of demographic analysis. But demographic analysis—which uses historical comparison of records of births, deaths and in- and out-migration—does not yield local level data. Tr. 1282-1283. The other possibility that the Bureau had was to use the results of the post-enumeration program ("PEP"), a forerunner of the post-enumeration survey used in 1990. The PEP had indeed generated valuable data reflecting the dimensions of undercounting in the 1980 census; however,

problems of missing data and matching error and other uncertainties about the survey's error structure made the PEP unsuitable, in the Bureau's view, for use in adjusting the census. Tr. 1277-1283.

Although concluding that the 1980 PEP could not be used for adjustment of the 1980 census, the Bureau was encouraged by what it had learned in conducting the PEP and believed adjustment might be feasible in 1990. Tr. 567-568. The Bureau determined that addressing the problem of differential undercount would be made a major priority in planning for the 1990 census. Tr. 516-521. The Bureau began planning for the 1990 census and adjustment in the early 1980's. Tr. 522-526.

In 1984-1985, the Bureau established an Undercount Steering Committee, comprising the senior Bureau executives whose divisions would be most directly involved, to coordinate the statistical and demographic research and the operational planning necessary for a possible adjustment of the 1990 census. Tr. 516-521, 1292. The Bureau also established an Undercount Research Staff, under the supervision of Dr. Wolter, which was charged with research into the causes of differential undercount, determination of the best approach to reducing differential undercount in the 1990 census and coordination of research to achieve that goal. Tr. 516-521.

Public review of the Bureau's research projects was a formal part of that process. PX 545 at 1. Believing it important to establish a consensus of support among professional groups and other communities that use decennial census data, the Bureau established contact with outside groups. Tr. 521-525. Standing advisory committees of, among other organizations, the American Statistical Association and the American Population Association were asked to review and comment upon Bureau research initiatives and findings in the areas of undercount and correction during the 1980's.

Tr. 1295-1296. The Bureau also contracted with the National Academy of Sciences ("NAS") to create a Panel on Decennial Census Methodology to provide the Bureau with wide-ranging advice drawn from a number of academic specialists approaching the issue of statistical correction from different backgrounds and orientations. Tr. 1295-1296, 1469-1474.

As a result of the Bureau's communications and coordination with independent academics and researchers, with the advisory committees, and with the NAS panel, consensus was reached that the post-enumeration survey could ameliorate the differential undercount. Tr. 524-525, 622-623. Except for a few theoretical extremists, the statistical community concluded that adjustment of the census was feasible. Tr. 525, 1383-1386.

After reviewing other possibilities, the Undercount Research Staff focused its analysis on further development of a "capture-recapture" or "dual system estimation" approach, picking up from the work that had been done in connection with the PEP. Tr. 560-561. The essential feature of dual system estimation is the use of a second measurement to ascertain the quality of estimation obtained by an initial measurement. Put in terms of a census, a dual system estimate is obtained when an initial survey (the enumeration, or "capture") is followed by a second measurement (the post-enumeration survey, or "recapture"), in which the variable to be measured is the frequency with which persons were properly recorded in the first count. Tr. 506-513. The Undercount Research Staff concluded that dual system estimation held the greatest hope for effective correction of the census to reduce differential undercount. Tr. 560-561.

2. The Undercount Research Staff, during the mid-1980's, developed a post-enumeration survey that would overcome the obstacles that had prevented making use of the PEP as a basis for adjusting the 1980 census. Tr. 567-575. Using the PEP as a starting point, the Bureau designed the 1990 PES with error-

resistant improvements. PX 703. Among many other refinements were a process for construction of an independent address list to permit identification of errors arising from inadequacies in the lists used for the uncorrected counts, Tr. 209-210; PX 9 at 4-11, and development of an automated matching system to facilitate reliable comparison of the populations found in the original count and in the PES. Tr. 508-509, 1297-1298.

The actual adjustment to be produced by the PES would be carried out through post-stratification. Tr. 513. For that purpose, the country would be divided into more than a thousand post-strata (ultimately, the Bureau settled on an arrangement involving 1,392 post-strata), each defined by geography, age, race, sex, Hispanic (versus non-Hispanic) origin and "tenure" (status of the housing unit as rented or owner-occupied). Tr. 513-514. The categories selected were the ones the Bureau had determined in its own research and in its review of research by other specialists to provide the greatest explanatory power in analyzing differences in undercount rates. Tr. 513-514. Thus, the Undercount Research Staff approach would provide one undercount figure for, say, black males between the ages of 20 and 29 living in rented housing units in New York City, another figure for black females of the same age group living in the same units, another for equivalent non-black Hispanic males and so on. Tr. 513-514; PX 54, App. 5. The post-stratification scheme, by dividing the country into an exhaustive set of non-overlapping post-strata, would define a unique undercount factor associated with each person. Tr. 513-514. The actual adjustment would be based on application of the undercount figures associated with particular post-strata to the blocks in which those post-strata were located. PX 54, App. 3.

The Bureau's post-stratification was designed to control "correlation bias"—the tendency of the PES to miss the same people missed by the uncorrected census. In estimating the

population, a post-enumeration survey that groups together persons with low capture probabilities and persons with higher capture probabilities will tend to understate the undercount. Tr. 578-579; PX 5 at 9-2. The principle underlying the Bureau's post-stratification design was to group within each post-stratum individuals having a generally similar likelihood of being counted in the census. The assumption was not that they would share exactly the same probability, but rather that individuals within a post-stratum would be more similar to one another (with respect to their likelihood of being counted in the census) than to individuals in other post-strata. Tr. 205-208.[9]

The design of the PES represented an improvement over the 1980 PEP in important respects. But the PES—and the contemplation of its use to correct the 1990 census—did not represent a radical departure in the conduct of the census. As already observed, the Bureau had made use of statistical adjustment in previous censuses.

The specific technique of a post-enumeration survey had been repeatedly used, in one form or another, by the Bureau, well before 1990. The Bureau conducted its first post-enumeration survey in 1950. PX 19. It used variations on the technique in 1960 (PX 20), 1970 (PX 21), and 1980 (PX 3). More generally, the capture-recapture model, upon which the post-enumeration survey technique is based, has been applied to human populations since 1931, when it was first used in connection with the Canadian census. Adaptations of the technique to the census context have been discussed in the

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[9] Thus, the United States is misleading in writing, "For example, a post-stratum for white single male renters, aged 20-29, living in New York City 'assumes' that the capture probability for a 29-year-old white male law firm associate living in a rented condominium in Manhattan is the same as the capture probability for a 20-year-old white male laborer who rents a room in Queens." U.S. Br. 12.

scientific literature for decades. Tr. 1528-1532; PX 18. Other components of the PES design, such as stratification and smoothing,[10] are also widely used by the Bureau or other survey researchers. Tr. 514-515.

The PES and its components were subjected to a rigorous battery of field-tests throughout the mid-1980's. Tr. 602-603. There were tests in Tampa, Florida in 1985, in Mississippi and in Los Angeles in 1986, and in North Dakota in 1987. The PES was further tested in the "dress rehearsal" census conducted in 1988 in St. Louis, in other parts of Missouri, and in Washington State. Tr. 602. Multiple testing ensured that every aspect of the PES was tested under field conditions and also gave the Bureau test results to permit further refinement and improvement of PES design. Tr. 602-603. The tests confirmed the reliability of the PES design, the success of the Bureau's innovations and the ability of the adjustment process to generate more accurate census counts. Tr. 609-614. The tests also showed that the PES would find many—but by no means all—persons missed by the census; adjustment would improve census accuracy but would not *over*correct the undercount. Tr. 612-613.

3. By the spring of 1987, the Undercount Research Staff had completed extensive research on, planning for and field

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[10] Where multiple, related post-strata are created, survey researchers often assume that useful information about the behavior of one post-stratum may come from other, related post-strata. Smoothing in the PES supplies that information systematically, by using other PES-derived data to "predict" the undercount rate for a post-stratum and then generating a weighted average of the predicted and observed undercount rates. Smoothing enhances confidence in PES-derived undercount rates and does so, technically, by reducing sampling error. While it is true that, as the United States says, smoothing is an "attempt to correct for sampling error", U.S. Br. 9, every component of the uncorrected census, from non-response follow-up through last resort and closeout, could equally well be described as an "attempt to correct for non-sampling error."

tests of the PES. Based on that body of work, Dr. Wolter and the Undercount Research Staff concluded that adjustment of the 1990 census was technically feasible. Tr. 619; PX 5; PX 148.

The basis for their conclusion was the determination that their work had successfully identified all major potential sources of error in the PES-based adjustment. PX 5 at 7. The eight sources of error were missing data, matching error, error in determining the number of erroneous enumerations, fabrications, balancing error, respondents' misreporting of Census Day address, correlation bias and random error. PX 5 at 2-1 to 2-3. Dr. Wolter and the Undercount Research Staff determined that the PES-based adjustment designed by the Bureau could be expected to control all sources of possible error, yielding an adjustment more accurate than the uncorrected census counts. PX 148.

As the Bureau moved forward with planning for adjustment, however, the Commerce Department for the first time displayed an interest in the subject—an interest that immediately took the form of hostility. In a memorandum dated May 19, 1987, Harry A. Scarr, executive assistant to Under Secretary Robert Ortner, wrote to Dr. Ortner: "You asked for problems with adjustment. Here are some." PX 574, cover memorandum. Dr. Scarr went on to identify, as "adjustment problems," the facts that:

> "In general, it can be assumed that states or places with large minority populations will have population added to their counts. * * * States with large minority populations would benefit from an adjustment and states with small minority populations would lose seats."

PX 574, attached memorandum at 1. And he pointed out "groups that are likely to be pro adjustment" and "groups that are likely to be against adjustment." Among the former, Dr. Scarr particularly expected to find "[p]oliticians from those

cities or places with large minority populations"; among the latter, he noted "[p]oliticians representing those areas which might be expected to lose shares of fixed pies . . . , i.e., those areas with small minority populations." PX 574, attached memorandum at 4.

On May 20, 1987, the Bureau's senior staff met to discuss a recommendation on planning for adjustment. With virtual unanimity, the staff concluded that adjustment was technically feasible, although there were reservations expressed about the Bureau's ability to provide a timely set of corrected figures. Tr. 1310-1317; PX 597. Under the direction of the Bureau's Associate Director for Statistical Methodology, Dr. Bailar, a record of the staff's deliberations was compiled and presented to the Bureau's Director, John G. Keane. Tr. 1310-1311; PX 597. After reviewing the record, Dr. Keane concluded that prospects for a successful adjustment were good, that the problem of differential undercounting was serious and otherwise intractable, and that the Bureau should proceed with plans to adjust the 1990 census. Tr. 1318.

Dr. Keane made his decision assuming that, as with all other decisions about census operations and pursuant to the existing delegation of authority from the Department of Commerce to the Director of the Census, the decision whether to proceed with planning for adjustment was one that he had the authority to make. Thus, Dr. Keane prepared for the public announcement of the Bureau's determination to proceed with plans for a correction, including the development of an appropriate press release and body of material for general circulation. Deposition of John G. Keane ("Keane Dep."), at 448-449. Before making a public announcement, however, Director Keane met on June 2, 1987 to brief Under Secretary Ortner, his immediate superior. Tr. 1320. In that briefing, Director Keane explained the rationale for his decision:

> "No matter how well we conduct the 1990 census we do not expect to eliminate the differential undercount. * * * We use every known cost efficient counting procedure and advertising approach to cover those segments of the population we miss. Statistical techniques are the only potential means of reducing the differential undercount."

PX 232 at 1.

After that briefing, the Commerce Department removed the authority to decide the adjustment question from Director Keane. Tr. 1321; Keane Dep. 452-453. Although the Department issued no immediate statement, on October 30, 1987 it issued a press release informing the public that the 1990 census would not be adjusted. PX 475. The press release, two-and-a-half pages long, offered little explanation for the decision, other than the general assurance that the 1990 census was expected to be good enough not to need adjustment. *Ibid.*

The *City of New York* lawsuit was filed in November 1988, after plaintiffs had spent a year obtaining, pursuant to Freedom of Information Act requests, and reviewing the documentation supporting the Bureau's determination to proceed with planning for adjustment. Plaintiffs initially sought a preliminary injunction to reinstate the Bureau's plans for the PES, without which there would be no possibility of adjusting the 1990 census. On July 17, 1989, as the district court was about to begin a hearing on the application, the parties entered into a stipulation, simultaneously entered as an order of the court, resolving the motion. Jt. App. 61. Among other provisions, the 1989 stipulation vacated the Department's decision against adjustment and committed the defendants to reconsider the question of adjustment with an open mind and without prejudgment (¶ 2); obligated the defendants to conduct a PES of not fewer than 150,000 housing units—a number they represented to be large enough for the purpose—and all other adjustment-related operations

necessary to ensure the possibility of using the PES-based population figures to adjust the census (¶ 3); required the defendants to "develop and adopt guidelines articulating what defendants believe are the relevant technical and non-technical statistical and policy grounds" for the adjustment decision (¶ 4); required that the Secretary announce a decision by not later than July 15, 1991 and that, were he to decide against adjustment, he accompany the decision with a detailed explanation of the grounds therefor (¶ 5); required that any census counts issued before the adjustment decision be accompanied by a legend advising recipients that the data were subject to possible adjustment (¶ 6); and established that the Secretary would appoint a special advisory panel of eight members (¶ 7), four of whom were to be nominated by plaintiffs' counsel and the other four selected by the Secretary at his discretion. Jt. App. 62-64.

4. The Department of Commerce published eight guidelines for the adjustment decision on March 15, 1990.[11]

The guidelines did not lay the groundwork for a neutral decision on adjustment dictated solely by a determination whether adjustment would increase the accuracy of the census. Ignoring the history of statistical inference in compilation of past censuses and unwilling to acknowledge the Bureau's expertise in assessing improvements in census

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[11] Each of the eight guidelines was accompanied by an "explanation." Final Guidelines for Statistical Adjustments of 1990 Census, 55 Fed. Reg. 9,838 (March 15, 1990). The material reproduced in the Secretary's decision includes the original guidelines and the explanations that accompanied them upon their publication; the discussions in the decision were not published until issuance of the Secretary's decision. For the original guidelines and explanations (corresponding to the March 15, 1990 publication), *see* Pet. App. 151-156 (text of guideline and explanation for guideline one); 202-203 (guideline two); 213-214 (guideline three); 228-229 (guideline four); 238 (guideline five); 241-242 (guideline six); 249 (guideline seven); 256-257 (guideline eight).

accuracy, the Department stated that "the assertion that a method involving statistical inference could lead to a more accurate enumeration warrants close scrutiny." Pet. App. 152. For purposes of that "close scrutiny," the Secretary's first guideline erected a presumption in favor of the superior accuracy of the unadjusted counts. To rebut that presumption, "the evidence . . . must show *convincingly* that the count can be improved by statistical adjustment at national, state *and local* levels." *Ibid.* (emphasis supplied). The requirement of *convincing* evidence of improvement at *local* levels would necessarily subject the adjusted figures to a test of extraordinary rigor; nowhere in the guideline or its explanation, however, is there an attempt to justify imposition of that test in terms of improving the accuracy of census data for their constitutionally or statutorily required uses.

As its broad language foretold, guideline one was to become the primary basis for the Secretary's decision. The presumption against correction was invoked to justify the Secretary's disregard of evidence that the adjusted counts improved the numeric accuracy of the counts, his concern that improved distributive accuracy be demonstrated across a wide range of comparisons without regard to how census data are actually used and his approach to analyzing distributive accuracy—an approach the United States subsequently admitted was invalid. In practice, the presumption against correction in guideline one proved irrebuttable, permitting the Department of Commerce to reinstate its 1987 decision against correction. That presumption, and only that presumption, underlies the Secretary's determination that the adjusted counts that ameliorate the differential undercount are less accurate than the unadjusted counts that preserve the differential undercount.

5. The uncorrected 1990 enumeration confronted all of the difficulties that have typically prevented the census from achieving an accurate count of such groups of Americans as

minority residents of inner cities. As the count progressed, there were constant indications that the census, once again, was having difficulty enumerating that hard-to-count population, just as the Bureau had predicted, and that coverage improvement programs would not be able to offset that disadvantage. Tr. 260-263.

The uncorrected census counted 248.7 million residents of the United States. The PES-based adjusted census counted 254.0 million. PX 478. Demographic analysis estimates provided a national population figure of 253.4 million, not significantly different from—and thus essentially confirming—the PES-based count. PX 55 at 5-7, 10.

The PES-based estimate found that the overall net national undercount rate for the uncorrected enumeration was 2.1%, or 5.2 million out of a population of 254.0 million. As expected, the undercount was far more severe among minorities. The undercount rate for blacks was 4.8%. Of the population missed by the uncorrected enumeration, more than 1.5 million out of 5.2 million were black; thus, while constituting only 12% of the national population, blacks were 29% of those omitted from the uncorrected count. The undercount rate for Hispanics was even higher: 5.2%. About 1.25 million Hispanics were missed by the uncorrected enumeration; Hispanics, constituting 9% of the national population, were 24% of the total uncounted. The undercount rate for American Indians was 5.0%, for Asian/Pacific Islanders 3.1%. PX 478.

In general, undercounting was concentrated in areas where minorities are concentrated—in California, Texas, Florida and other states of the Southwest and South and in major cities across the country. The state with the highest percentage minority population in the continental United States, New Mexico, had the highest undercount rate, 4.5%. The undercount rate in California of 3.7% reflected the omission in the uncorrected count of over one million people in the

state, nearly 200,000 of them in Los Angeles alone, which had an undercount rate of 5.1%. In Texas, with a statewide undercount rate of 3.2%, more than 500,000 people were missed. In Houston alone, with an undercount rate of 5.0%, more than 85,000 people were missed. In Florida as a whole the undercount rate was 2.6%; in Miami, it was 4.6%. Undercounts well above the national average were also found in the big cities of the Northeast, Mid-Atlantic and Midwest, including New York (3.0%), Chicago (2.6%), Detroit (3.5%), Baltimore (4.7%) and Washington, D.C. (5.0%). By contrast, the PES results showed that the disproportionately white populations of the Great Plains, Midwest and Northeastern (especially New England) states tended to be fairly well covered by the uncorrected enumeration. *Ibid.*

The PES results showed too that the uncorrected census counts led to a malapportionment of the House of Representatives, with two seats erroneously assigned to Wisconsin and Pennsylvania that should in fact have gone to California and Arizona, respectively.

The use of a fixed formula that apportions congressional seats based on state population—the "method of equal proportions" required by 2 U.S.C. § 2—makes it possible to determine precisely the consequences of using the uncorrected enumeration for the apportionment of the House, that is, for the allocation of political representation *among* states. Similar exactitude cannot obtain in describing the consequences for the drawing of district lines *within* states, whether for congressional or state legislative seats, because those lines are typically the product of political negotiations rather than automatic formulas. But the general effect is clear. The concentration of undercount among minority populations means that when the uncorrected enumeration is used for redistricting disproportionately minority districts are systematically overpopulated. The consequence, when that effect occurs throughout a state, is to reduce the number of

districts likely to be represented by minorities and thus the amount of representation accorded to minority residents of the state.

Plaintiffs presented evidence at trial demonstrating the effect of that pattern. Tr. 1199-1208. Looking at California congressional districts actually drawn using uncorrected 1990 census data, one sees that the highest undercount is consistently recorded in districts with heavily minority populations, with the highest undercounts in South Central Los Angeles and Watts, and the lowest undercount in districts with non-minority populations, such as the middle-class suburbs. Tr. 1200-1203. The result is that for congressional districts, each of which is supposed to have virtually the same population, there is in fact a marked disparity. Minority districts are overpopulated by about 4 to 5 percent, while non-minority districts are underpopulated by about 2 to 3 percent. Tr. 1207. In the case of California's congressional districts, the special masters who drew the district lines intended that the districts have a population variance of only one-half of one percent. Tr. 1207-1208. Thus, the effect of the differential undercount left uncorrected in the census is to disturb the effort to achieve equipopulous districts and to produce districts that deviate from equipopulousness far more than is constitutionally permissible. Tr. 1207. The same pattern of correlations between minority populations and severity of undercounting can be seen across state senate and assembly seats in California. Tr. 1203; PX 587; PX 588; PX 589.

6. The results of the PES—nationally and within racially and ethnically heterogeneous states such as California—accord with expectations about census coverage. The largest undercounts were recorded where minority populations are greatest. In that sense the PES results have "face validity." Tr. 1544-1545. The face validity of the PES results was one factor taken into account by the Bureau's Director, Barbara E. Bryant (who had succeed Dr. Keane in 1989), and the

members of the Undercount Steering Committee as they reviewed the results of the PES and the uncorrected census in June 1991 in order to determine whether the adjusted or the unadjusted counts were more accurate and whether the census should be adjusted. They took into account as well the general agreement between the demographic analysis estimates and PES-based figures, which accord in finding a severe undercount running through the uncorrected enumeration. As Director Bryant put it: "Two independent types of research provide estimates that the resident population of the United States is 253-254 million, not 248.7 million, as enumerated." Jt. App. 73.

In reaching their conclusion, both Dr. Bryant and the members of the Undercount Steering Committee majority stressed that the PES was planned and conducted superbly. Dr. Bryant wrote: "The quality of the 1990 Post-Enumeration Survey is excellent." Jt. App. 73. And the Undercount Steering Committee majority stated that its "conclusion is based in large part on [the] finding that the post-enumeration survey is a measurement instrument of unusually high quality." PX 54 at 2.

The Bureau's leadership was able to arrive at those conclusions because the potential sources of error in the PES had been painstakingly established by the Undercount Research Staff during the 1980's and the actual levels of error in the PES had been thoroughly calibrated by the extensive series of evaluation studies—the "P-projects"—conducted by the Bureau as an application of the adjustment standards that had been developed since 1987. PX 540A. Those studies showed that each of the measurable sources of error had been controlled, leaving survey results that could reliably be used to adjust. Tr. 646-650.

The Bureau reached the conclusion that missing data were not a problem in the PES by carefully studying the effects of using alternative imputation models to deal with missing data

in generating the adjusted counts. PX 540A.1. That study—PES Evaluation Project P1—demonstrated that there was an extremely low level of missing data in the 1990 PES and that its impact on the PES estimates was small. Tr. 649, 1338, 1561-1562.

The Bureau used expert rematching to test the quality of clerical matching in the production PES. The Bureau's study—PES Evaluation Project P7—showed that matching error in the PES was not a serious source of bias and was accurately measured. PX 540A.7; Tr. 649-650. Together, the problems of missing data and matching error had been the major technical problems that had confronted the 1980 PEP.

Other, less problematic sources of potential error were also closely monitored. Evaluation Project P4 explored misreporting of census day address, typically a problem for respondents who have moved between Census Day and the day of the PES interview, and found that the impact of aggregate error attributable to misreporting on the overall PES was insignificant. PX 540A.4. Fabrications were found to be minimal in Project 5a, which was designed to explore the rate of fabrications in the PES through evaluation follow-up of a large sample of PES blocks. PX 540A.5a. The effect of errors in classifying erroneous enumerations in the E-sample was examined in Project P9a, which used follow-up reinterviews and also led to the conclusion that error from that source was of minimal consequence. PX 540A.9a. Project P11 confirmed that the selection of matched sets of E-sample and P-sample blocks with comparable search areas for matches of cases had controlled error relating to balancing of the P- and E-samples. PX 540A.11.

Unlike other errors, correlation bias cannot be measured directly. But the Bureau's design of the PES controlled correlation bias by ensuring that it could affect the PES in only one way—*by leading to an underestimation of the extent of undercount*. The Bureau also designed the PES to reduce

correlation bias through post-stratification. Project P12 analyzed the success of the post-stratification in achieving a reduction in correlation bias. PX 540A.12. Based on the results of Project P12, the Bureau concluded that the post-stratification had been effective. PX 55 at 17-19.[12]

The final source of error affecting the PES figures is random (sampling) error. Because it is based on a sample, the PES is inevitably affected by sampling error, but the effect of that source of error is reduced by smoothing. Tr. 514-515, 813-817.

The Bureau accumulated the measurements of PES error into a single "total error model." PX 540A.16. The Bureau was then in a position to gauge the combined effects of all PES errors, including both bias (systematic, or non-random, error) and variance (non-systematic, or random, error), on the accuracy of the population figures generated by the dual

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[12] Summarizing the Bureau's findings, Director Bryant wrote: "[The p]rofessional judgment of the majority of the Census Bureau's Undercount Steering Committee is that the probability of having been counted or not in the census is sufficiently homogeneous among block parts [the relevant unit of analysis for Project P-12] within post-strata to support adjustment." Jt. App. 85-86. The United States says, U.S. Br. 13, that in Project P-12 the Bureau found (in the Secretary's interpretation) "significant *heterogeneity* by state within post-stratum for well over 80% of the post-stratum groups." Pet. App. 207 (italics in original document but not reproduced in cited source). Project P-12 comprised three parts, of which the latter two are relevant here. Part two, on which the Bureau principally relied, Jt. App. 85, did *not* show significant heterogeneity, as the Secretary conceded, Pet. App. 206. Part three, designed for other purposes, involved a sample so large that, as the authors of the study point out, "trivial difference[s] will be [statistically] significant." PX 540A.12 at 2. The *significance* of the heterogeneity found in part three is *statistical significance*, which refers to the confidence with which one has estimated a phenomenon, not the size of the phenomenon: in other words, the Bureau was very confident that the heterogeneity found actually existed, but was also very confident that it was trivial.

system estimate and to compare those effects with the distortions attributable to the bias involved in the uncorrected enumeration. PX 55 at 12. The particular statistical format for making that comparison is a loss function analysis. Tr. 596-597, 925-927, 946-948.

Loss function analysis is based on the measurement of error in the uncorrected census by the PES and the measurement of error in the PES-based figures by the PES evaluation projects. Jt. App. 81. The PES results demonstrated the existence of pervasive biases in the uncorrected census. The PES results show that the census undercounts minorities far more severely than whites, and the total error model shows that correcting for the biases found in the PES figures does not seriously change that outcome. PX 540A.16. Loss function analysis confirms that, as the PES and P-Project results indicate, the adjusted counts do in fact achieve greater accuracy. Jt. App. 83.

The Bureau conducted a series of loss function analyses. In most instances, the Bureau was interested in, and its loss function analyses focused on, the proportional (rather than numeric) accuracy of counts for areas, although the Bureau did calculate numeric loss functions as well. In a series of loss functions, the Bureau calculated loss using squared and absolute[13] error, both for states and for a variety of different levels of jurisdictions and geography. The Bureau also calculated loss functions for the apportionment of the House of Representatives. Tr. 936. Every loss function performed by the Bureau has shown that the adjusted counts are expected

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[13] In raw calculation, loss is expressed with a positive or a negative sign. To aggregate loss, and prevent losses in opposite directions from cancelling, the absolute value (disregarding sign) may be used, or loss may be squared (resulting in a positive sign). Squaring emphasizes the effects of large errors. Tr. 936.

to have significantly less loss than do the unadjusted counts. Tr. 949, 969-970.

In the penultimate loss function analysis completed by the Bureau before the Secretary's decision on adjustment, the ratio of squared error loss for the unadjusted counts to squared error loss for the adjusted counts is at least ten to one. Tr. 950-951; PX 43 at 11290. In that loss function, the adjusted counts have substantially less loss for all levels of aggregation and geography—counties of 500,000 or more; counties of 200,000 or more; counties of less than 200,000; non-metropolitan areas in counties of less than 200,000; metropolitan areas in counties of less than 200,000; metropolitan areas in counties of 500,000 or more; metropolitan areas in counties of 200,000 or more; non-metropolitan areas in places of 25,000 to 49,999; non-metropolitan areas in places of less than 25,000; metropolitan areas in places of 500,000 or more; metropolitan areas in places of 50,000 or more; metropolitan areas in places of 25,000 to 49,999; and metropolitan areas in places of 25,000—with a single exception. The exception—the only areas for which that loss function analysis shows the unadjusted counts more accurate—is non-metropolitan areas in places of more than 50,000. There are five such places in the United States, and they contain 60,000 people in total. Tr. 957-959; PX 43 at 11294-11295.

A subsequent loss function analysis, the last completed by the Bureau before the Secretary's decision, reflects, even more starkly, the same pattern. PX 42. The analysis calculates both squared and absolute errors. The squared error loss function shows a ratio of greater loss from unadjusted counts than from the adjusted counts of at least twelve to one; the absolute loss function shows a ratio of three to one. Tr. 969-970; PX 42 at 6087, 6090. The final loss function analysis also shows that the unadjusted counts are expected, approximately, to malapportion two more seats in the House

of Representatives than are the adjusted counts. Tr. 968; PX 42 at 6086.

In their technical assessment of the accuracy of the adjusted and unadjusted counts, seven of the nine members of the Undercount Steering Committee concluded that the adjusted counts were more accurate than the unadjusted and that the census should be corrected on the basis of the PES. PX 54 at 1-2. Two members of the Undercount Steering Committee dissented, concluding that the adjusted counts had been shown to be more accurate only for certain purposes and for certain groups (and to that extent the minority joined in the conclusion that adjustment would be proper for those purposes and groups) but that additional study would be necessary to determine whether adjustment represented an overall improvement. PX 54 at 1-2. On June 28, 1991, Dr. Bryant transmitted to Secretary Mosbacher the recommendation of the Bureau that the 1990 census should be statistically adjusted on the basis of the PES to correct for the differential undercount. Summarizing the Bureau's position, Dr. Bryant wrote:

> "The PES, supported by Demographic Analysis, estimates that the resident population of the United States on April 1, 1990 was approximately 5.3 million greater than was counted in the census. The fact that both these Census Bureau research projects, including the one based on administrative records rather than census data, produce nearly the same 5 million number is strong evidence that these residents of the United States exist. Logic also supports the existence of people who cannot or will not be counted, although logic cannot confirm their numbers. In my opinion, not adjusting would be denying that these 5 million persons exist. That denial would be a greater inaccuracy than any inaccuracies that adjustment may introduce."

Jt. App. 84.[14]

C. The Secretary's Decision

1. On July 15, 1991, the Secretary rejected the Bureau's findings and the Director's recommendation and announced his decision against adjustment. The Secretary acknowledged that the unadjusted counts were affected by a substantial undercount, differential by race and ethnic origin, which adjustment would correct. Pet. App. 138-139, 200. He acknowledged too that the Bureau's analyses showed adjustment would improve numeric accuracy (absolute numbers) for States and local areas, Pet. App. 147, 184-185, 201,[15] and would improve distributive accuracy (proportional numbers) for places containing two-thirds of the national

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[14] Petitioners point out that in 1992 the Bureau revised the PES-based adjusted counts. U.S. Br. 18, Wisc. Br. 11. The revision lowered the estimate of overall national undercount from 2.08% to 1.58%. After explaining the 1992 revision, Director Bryant writes:

> If [Secretary] Mosbacher had decided to adjust the census on [July 15, 1991], these errors meant that we would have added slightly more people to the population than we should have. But even so, the adjusted numbers would have been closer than the census count to our best estimate of the "true" population in an environment where "truth" can never be precisely determined.

B. Bryant, *Moving Power and Money: The Politics of Census Taking* 165 (1995). The revision actually shows the differential undercount to have been *worse* than found in the 1991 PES figures. While the overall national undercount rate was reduced by .50%, the undercount rate for non-blacks dropped by .51%, the undercount rate for blacks by .39%, and the undercount rate for Hispanics by .28%. Thus the black/non-black differential went up .12, and the differential between the Hispanic and overall national undercount rates went up .22. *Id.* 164.

[15] The Secretary cautioned that, in his view, that conclusion "ha[d] not been definitively demonstrated." Pet. App. 201.

population, Pet. App. 141-142.[16] He conceded "the census' imperfections", Pet. App. 165, and "[t]he fact that the PES was generally a high quality survey", Pet. App. 181.

2. The Secretary reported a "diversity of opinion among my advisors." Pet. App. 140. He noted that "[t]he Special Advisory Panel split evenly as to whether there was convincing evidence that the adjusted counts were more accurate." *Ibid.* The Secretary did not explain that the Bureau's Director had recommended adjustment, that a majority of the Undercount Steering Committee had agreed that the adjusted data were more accurate nationally and at all levels and that even the committee's two dissenters favored *some* adjustment.

Nor did the Secretary explain that the four-four split in the Special Advisory Panel reflected the circumstances of its creation: the four members nominated by plaintiffs, including Dr. Wolter (who had opposed adjustment in 1980), recommended adjustment; the four members selected by the Secretary recommended against. One of the Secretary's four appointees, William Kruskal, later explained that the Secretary had chosen "people who were known to tilt against" adjustment and that the eventual four-four split was "in the

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[16] The United States attempts to retract the Secretary's concession with the argument that the two-thirds figure was based on an early Bureau estimate subsequently corrected to take into account an assumed increase in the variance of the PES. Thus, the United States writes, "the original loss function analysis substantially overstated the accuracy of the adjusted data." U.S. Br. 32 n.24. That is not so. High relative under- and overcounts were concentrated disproportionately in large States, notably California and Texas. Assuming an increased variance, as the Bureau did, left unaffected the conclusion that the corrected counts were substantially more accurate than the uncorrected. Deposition of Howard Hogan ("Hogan Dep.") 395-396; PX 643. The Undercount Steering Committee, PX 54, Addendum at 4; DX 1 at 915, explained to the Secretary *both* their tests of increased variance *and* their explanation that those tests continued to show the superior accuracy of the adjusted counts.

cards" from the Panel's inception, Deposition of William Kruskal, at 39-40. Another, Michael McGehee, had noted to his three co-nominees, early in the Panel's existence, that they were working for the "cause against adjustment," PX 240. The Panel member upon whose work the Secretary most heavily relied was Kenneth W. Wachter.[17] Dr. Wachter's nomination was recommended by a faculty colleague, David Freedman, who had been hired by the Department as a consultant in the spring of 1989 and who continued to advise

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[17] In his decision against adjustment the Secretary repeatedly rejected as unconvincing the Bureau's own analyses of the PES and the adjusted figures and found persuasive analyses performed by Dr. Wachter, whose work was conducted without contribution from or guidance or review by the Bureau. Tr. 1852-1853; Deposition of Charles D. Jones 185-186; Hogan Dep. 152. When Dr. Wachter speculated that adult black males missed by both the unadjusted census and the PES might be located in parts of the country other than those in which the PES had found high undercounts of adult black males (central cities across the nation and the rural South), the Secretary found that speculation more plausible than the Bureau's assumption that the missing adult black males were located in the same areas as adult black males who *had* been counted. Pet. App. 160-162. To the Secretary's mind, the Bureau's extensive analyses of the effects of missing data on the PES proved less compelling than Dr. Wachter's demonstration that less plausible assumptions than the Bureau made would have yielded different results. Pet. App. 170-171. The Bureau's two evaluation projects that analyzed heterogeneity were deemed irrelevant; only experiments conducted by Dr. Wachter with the assistance of a single graduate student, Tr. 2216-2222, provided what the Secretary considered probative evidence on the question of heterogeneity. Pet. App. 211. The Bureau's analyses of the effects of imputation in the PES yielded to another test run by Dr. Wachter. Pet. App. 218. The Bureau's development of smoothing was called into question by "serious concerns" raised by Dr. Wachter. Pet. App. 222, 226. Where Dr. Wachter and the Bureau's Director disagreed about the effects of adjustment on future census participation, Dr. Wachter's views were accepted, the Director's were "unpersuasive." Pet. App. 234. At every point, Dr. Wachter provided findings that contradicted the Bureau's own and were interpreted by Dr. Wachter and the Secretary as raising doubts about the adjustment process.

the Department through the trial of this action. Tr. 2345, 2466, 2469.[18]

3. In his decision, the Secretary devoted the bulk of his attention to guideline one. In discussing that guideline, the Secretary made three critical choices, all of them reflected but not all of them explicated in his decision. First, he decided that evidence of numeric accuracy was "not relevant" to the adjustment decision; second, he considered comparisons of the distributive accuracy of the unadjusted and the adjusted counts without regard to whether the comparisons bore on actual uses of census data; third, in making those comparisons, he treated every error as equivalent, regardless of the size of the error.

The Secretary stressed his choice of distributive rather than numeric accuracy as a critical factor in his decision, Pet. App. 182-184; in fact, that was not a point in controversy.[19]

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[18] Assuming *arguendo* that plaintiffs' nominees were just as close-minded as the Secretary's, it is still the case that the Secretary failed to explain why a deadlock that was preordained had any bearing on the merits of his decision.

[19] Only after it became apparent that a PES-based adjustment would improve numeric accuracy did the Department of Commerce announce that distributive accuracy was both central to the adjustment question and unrelated to numeric accuracy. In the press release that supplies the only articulation of its 1987 decision against adjustment, the Department did not contend that adjustment might degrade distributive accuracy—only that the unadjusted census was expect to achieve such a high level of *numeric* accuracy that adjustment would be unnecessary. PX 475. When the Department published the guidelines in 1990, it still had not discovered the centrality of distributive accuracy: not only is there no reference to distributive accuracy in the guidelines or their explanations, but the explanation accompanying guideline one requires a comparison of the accuracy of the adjusted and unadjusted counts at, *inter alia*, the national level. Pet. App. 152. Comparison at the national level is, of course, a comparison of the respective numeric accuracy of the two counts—the very comparison that the Secretary the following year found to be "not relevant" to the decision on adjustment. Pet. App. 184, 201.

The Bureau's long-standing concern with differential undercount, the concern that had actuated development and implementation of the PES and that informed the Bureau's preference for the corrected data, was a concern that the uncorrected counts led to misallocation of representation and funding. Jt. App. 79. Thus, the Bureau's fundamental concern was with distributive accuracy. Moreover, the Bureau presented its conclusion that the adjusted counts achieved superior accuracy in terms of both numeric and distributive improvement. Jt. App. 80. But the Bureau regarded evidence of improved numeric accuracy as bearing on the question of improved distributive accuracy; the Secretary, by contrast, regarded evidence of superior numeric accuracy as "not relevant" to the determination of distributive accuracy. Pet. App. 201. The Secretary's decision, which represents the only time that a decision about how best to achieve an accurate census has been removed from the Bureau, also represents the only time that decision has been made without regard for numeric accuracy. Every other decision made to improve the accuracy of the counts—including all of the methodological innovations discussed above—has been justified by the Bureau in terms of increased numeric accuracy. That approach does not mean that the Bureau rejects the distributive accuracy of the census as the ultimate criterion of improvement. Rather, the Bureau has chosen to introduce innovations to maximize numeric accuracy because it has always recognized that improving numeric accuracy is the clearest way to improve distributive accuracy. A census that achieves perfect numeric accuracy also achieves perfect distributive accuracy.

Distributive accuracy involves comparing the relative accuracy of the census count for different areas. It makes sense as a concept separate and apart from numeric accuracy only if comparisons are made that are related to the uses of census data—for determining apportionment, intra-state redistricting and the allocation of federal funds. While the

Secretary asserted that he was focusing on distributive accuracy because he was concerned with the uses of census data, his approach to distributive accuracy was unrelated to those uses. The Secretary considered whether improved distributive accuracy had been definitively demonstrated for groups of places, regardless of whether those places compete directly for representation, funding or anything else. For example, the Secretary cited the results of a Bureau loss function analysis of distributive accuracy for the 23 cities in metropolitan areas of 500,000 or more. Pet. App. 191. That analysis examines gains and losses for the cities in terms of their shares of the national population residing in those 23 cities. The question addressed by the analysis is *not* the same as the question of whether each city showed improved distributive accuracy *vis-a-vis* the national population or improved distributive accuracy *vis-a-vis* the State of which it is a part, analyses intimately connected to the issues of representation and funding. The Secretary's focus was on the question of whether, for example, Chicago's population was being counted more accurately just in comparison to places such as Los Angeles and San Diego, a comparison with no relevance whatsoever to any constitutional or statutory use of the census; the Secretary was ignoring the increased accuracy of Chicago's population as a share of the national total and a share of Illinois.

In the same vein, the Secretary relied on what he termed an absence of "direct evidence" for improvement of distributive accuracy with respect to places of under 100,000 population. Pet. App. 192. Those analyses would have compared places of under 100,000 population with one another—not with the national population, nor with the States of which the places are parts. In practical terms, the Secretary decided that evidence of improved accuracy for White Plains, N.Y. *vis-a-vis* Ashtabula or Sioux City was more important than evidence of improved accuracy for White Plains as a part of the nation or as a part of New York State. And again, no

constitutional or statutory justification for that preference was, or could have been, offered.

In his approach to distributive accuracy, the Secretary also disregarded the sizes of errors; thus, in the Secretary's analysis, large gains in accuracy (with significant practical consequences) could be offset by small losses in accuracy (with little or no practical significance). Tr. 1002, 1071; Hogan Dep. 258-259. Bureau analyses had demonstrated that adjustment would have the greatest impact and would do the most good in States with especially high undercounts, such as California, or especially low undercounts, such as Wisconsin. Tr. 1012-1014. For those states where the results of adjustment would be less certain to increase distributive accuracy—states with average undercounts—the impact of adjustment on apportionment, redistricting and funding would be minimal. *Ibid.* The Bureau's loss function analyses, like the rest of its work, had focused on aggregate loss, giving more weight to proportionally large errors than to proportionally small ones. PX 54; PX 643; Tr. 1075; Hogan Dep. 395-396. The Secretary, looking simply at the total number of States, cities or other areas with *any* error, disregarded that approach. Tr. 1000.

Specifically, the Secretary relied on a Bureau loss function analysis that he interpreted as showing that, with an increased estimate of PES sampling error, adjustment would decrease distributive accuracy for 28 or 29 States. Pet. App. 142; PX 54, Addendum at 4. In so doing, he treated all errors as if they were of the same magnitude. Tr. 1000. But many of the states that the Bureau's analysis treated as worsened by adjustment would in fact be virtually unaffected: adjustment would have changed their shares of the national population too little for any practical impact in terms of representation, funding or anything else. Tr. 1022. The Secretary ignored the Bureau's finding that the places improved by adjustment contained the great majority of the nation's population. *Supra*,

pages 35, 36 & n.16. His approach ignored as well the constitutionally primary purposes of the census and the indisputable improvement in census accuracy adjustment was shown to have for those purposes.

The National Academy of Sciences had explicitly warned against an approach such as the Secretary's, in which the sizes of errors are ignored. PX 2 at 282; *see also* Tr. 767, 1163. In the weeks before his decision the Bureau, addressing the same point, twice cautioned the Secretary that the "[i]ntuition that the break-even point is when half the states [are improved] and half [are worsened] is *not* correct." PX 54, Addendum at 4; *see also* PX 41 at 3217. At trial, Dr. Freedman conceded that the Secretary's approach was "borderline unreasonable". Tr. 2507. On appeal, the United States, citing Dr. Freedman's testimony, admitted that the Secretary's approach was "not a good way" to analyze distributive accuracy. Fed. App. Br. 47 n.16. The same error affects all of the Secretary's conclusions about the Bureau's loss function analyses, including the comparison of the 23 cities in metropolitan areas of more than 500,000 population; the concession that his approach was invalid is a concession that all of his findings concerning the comparative accuracy of the adjusted and unadjusted counts flowed from an invalid approach to comparisons of distributive accuracy.

Although the United States now concedes that "the adjustment was in large part proposed to remedy the disproportionate undercount of minorities", U.S. Br. 17 n.14, the Secretary never acknowledged that that was the purpose for which the PES was conducted nor that it had fulfilled that purpose. By the Secretary's own account, the prospect of ameliorating the differential undercount played little role in his decision.

D. Prior Proceedings

1. Upon announcement of the Secretary's decision, the *City of New York* plaintiffs resumed active litigation, challenging the decision as violative of equal representation rights under the Constitution, Art. I, § 2, cl. 3 (as amended by the Fourteenth Amendment, § 2) and the Fifth Amendment. The culmination of that challenge was a thirteen-day trial. Plaintiffs presented testimony by, among others, the four special advisory panel members they had nominated, including Dr. Wolter, and by Dr. Bailar. Defendants presented testimony by one Bureau statistician, Robert Fay,[20] and one other Bureau employee, Peter Bounpane; the crux of defendants' case, however, was presented by three retained experts, Drs. Freedman, Wachter and Paul Meier.

At the outset of its opinion, after summarizing the evidence of undercount in the uncorrected census and the accuracy of the adjusted data, the district court concluded: "This Court is satisfied that for most purposes the PES resulted in a more accurate—or to be statistically fashionable, a less inaccurate—count than the original census." Pet. App. 59. The court then turned to the question of whether, in

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[20] The focus of Dr. Fay's testimony was his account of a paper he was then writing in which he argued the variance of the adjusted census counts might be twice what the Bureau had estimated in June 1991. Tr. 1915. But the Bureau had taken that possibility into account in reaching its conclusion that the adjusted counts were more accurate. PX 54 at 6-7, App. 6 at 5. Loss function analysis demonstrates that, even if one assumes the levels of variance proposed by Dr. Fay, the adjusted counts are much more accurate than the unadjusted. Tr. 1019-1021. Dr. Fay's more general point, as implied by the United States' summary that he "no longer advocated *the adjustment recommended by the Committee*", U.S. Br. 38 (citing Tr. 1920-1921) (emphasis supplied), was that, after an additional year of research, he believed other adjustments of greater accuracy could be made.

light of that finding, the Secretary's decision might nonetheless be upheld.

At the heart of the district court's decision lie a pair of determinations, the joint effect of which was to accord the Secretary a double measure of deference. First, the court deemed itself empowered to review the Secretary's decision only to the extent of determining whether the Secretary had been arbitrary or capricious. Pet. App. 89-91. Citing the writings of Montesquieu and Locke, the Massachusetts Constitution of 1780 and *The Federalist* No. 72 (Hamilton), the court found that a proper concern for the separation of powers dictated a limited "role [for] the judiciary . . . when the controversy relate[s] to the management of the government." Pet. App. 89. The court implicitly found that "judicial intrusion" in such a controversy is available only under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and then only "when the administrative decision abuses reason." Pet. App. 90; *see also* Pet. App. 69. Second, the court tested the reasonableness of the Secretary's decision only in terms of his application of the guidelines. In discussing each of respondents' objections to the decision, the court examined only whether the Secretary had reasonably applied a guideline to support his conclusion. Pet. App. 71-89. The court did not consider whether the Secretary's decision was arbitrary or capricious other than as an application of the guidelines, nor did the court consider whether the Secretary's decision (whether viewed as an application of the guidelines or otherwise) was constitutional.

Indeed, although the district court discussed the Constitution preliminarily as the source of the requirement that "the census . . . be as accurate as practicable", Pet. App. 67, the court did not thereafter refer to the Constitution, with two minor exceptions: first, the court concluded that "[t]he Secretary's decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal

of assuring the most accurate census practicable", Pet. App. 77; second, the court summarily stated: "I . . . find that the Secretary's decision not to adjust the 1990 census does not violate the APA, the Constitution, the [1989] Stipulation, or any statute", Pet. App. 94. No further analysis or reference supported that summary statement.

Given its conclusions regarding the deference to be accorded the Secretary, the court determined that his rejection of adjustment was entitled to be upheld, despite the court's own conclusion that adjustment would improve the accuracy of the census. The court explained the connection between the standard of review it adopted and the result it reached:

> "The breadth of the guidelines left the Secretary enormous discretion. Plaintiffs have made a powerful case that discretion would have been more wisely employed in favor of adjustment. Indeed, were this Court called upon to decide this issue *de novo,* I would probably have ordered the adjustment. However, it is not within my province to make such determinations. The question is whether the Secretary's decision not to adjust is so beyond the pale of reason as to be arbitrary or capricious. That far I cannot go."

Pet. App. 89 (footnote omitted). The court reiterated later: "While plaintiffs' counsel has illustrated that adjustment is statistically feasible, and would improve the quality of the counts for most purposes while ameliorating the profoundly disturbing problem of differential undercount, the Court cannot, on the record before it, supplant the Secretary's decision." Pet. App. 94-95. And the court observed that "plaintiffs have made a compelling attack on the [Secretary's] *Decision*, and the Secretary has conceded that the objective criteria used to measure the adjusted counts show a greater numeric accuracy at the national level and that the Census

Bureau estimates of distributive accuracy marginally favor the adjusted counts . . ." Pet. App. 77.[21]

No fair reading of the court's opinion supports the United States' statement that the district court's decision was "enigmatic" in its findings on the relative accuracy of the two counts. U.S. Br. 44. The United States has extracted from its context the second of two sentences from the opinion. The district court wrote:

> "Plaintiffs' attack on the Secretary for subjecting the tests favoring adjustment to unrealistically rigorous scrutiny misconstrues Guideline One, which clearly states that '[t]he Census shall be considered the most accurate count of the population of the United States, at the national, state, *and local levels, unless an adjusted count is shown to be more accurate.*' [Citation omitted.] Thus, plaintiffs' failure to illustrate affirmatively the superior accuracy of the adjusted counts either (1) at any level mentioned in Guideline One, or (2) for any reasonable definition of accuracy, is sufficient to support a finding that Guideline One favors use of the original census counts."

Pet. App. 78 (emphasis supplied by the district court in its 1993 opinion). The court's point was that guideline one required an affirmative showing of superior accuracy of the adjusted counts at every level and for every reasonable definition of accuracy; if plaintiffs failed at any hurdle, their success in passing all the others would be insufficient to save their cause. The court was not saying, as the United States'

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[21] It is clear in context that the district court did not endorse the Secretary's conclusion that the Bureau's estimates of distributive accuracy only *marginally* favored the adjusted counts; the court was describing the extent of the Secretary's concession. It is also clear that that concession was made even after taking into consideration a higher estimate of variance in the PES than originally assumed by the Bureau. *See* Pet. App. 74.

selective quotation of only the last sentence of that paragraph is meant to suggest, that there was no level and no definition of accuracy for which plaintiffs had proved the superior accuracy of the adjusted counts. On the contrary, the court had already explained that it was satisfied adjustment would improve the accuracy of the census counts "for most purposes."

The court's conclusion that guideline one supported the Secretary's decision rested on two elements of that guideline: its presumption against adjustment, and its requirement of demonstrated increases in accuracy at local levels. The latter element, as the court understood it, meant that the Secretary could properly focus attention on the absence of "direct evidence," as he saw it, for improved distributive accuracy for places of under 100,000 in population, *regardless of whether that analysis had any bearing on the constitutional uses of census data.* The presumption, in turn, meant that, even if the weight of the evidence demonstrated affirmatively that adjustment would otherwise improve distributive accuracy, the Secretary's residual uncertainty about any aspect of the comparison between the adjusted and the unadjusted counts was a sufficient basis for his conclusion that the unadjusted counts were more accurate.

In short, the court found that the adjusted counts were more accurate but determined that the Secretary's decision against adjustment nonetheless constituted a non-arbitrary application of the Secretary's own guidelines.

2. On appeal, plaintiffs argued that the district court had adopted the wrong standard for review of the Secretary's decision. Plaintiffs contended that the Secretary's decision affected constitutional rights, because the differential undercount had been shown to result in a malapportionment of the House of Representatives and to affect intra-state redistricting, and that the district court's deferential review of the decision was therefore erroneous.

The court of appeals agreed with plaintiffs that the lower court had erred in the deference it accorded the Secretary. The court of appeals reasoned that, since plaintiffs had shown that the adjusted data are more accurate and that the failure to correct therefore deprives citizens of equal votes by diluting the voting strength of residents of areas with high undercount, the Secretary's decision was to be reviewed under a line of analysis that begins with *Baker v. Carr*, 369 U.S. 186 (1962), and continues through *Karcher v. Daggett*, 462 U.S. 725 (1983). Pet. App. 26-31. That line of cases, according to the court of appeals, (1) requires that, as near as practicable, one person's vote must be worth as much as another's; (2) holds that the right to vote is impaired by dilution as well as by complete disenfranchisement; and (3) imposes upon *States* the obligation to make a good-faith effort to achieve the goal of one person, one vote. Pet. App. 31. The court of appeals concluded that the same reasoning applies, *mutatis mutandis*, to *federal* decisions bearing on equality of representation. Because of separation of powers considerations, the court of appeals determined, *de novo* review would be inappropriate. Pet. App. 34. And because of constitutional constraints, precise equality of populations in congressional districts cannot be maintained across state lines. Nonetheless, the court of appeals reasoned that recent decisions of this Court, including *United States Department of Commerce v. Montana*, 503 U.S. 442, 463-464 (1992), and *Franklin v. Massachusetts*, 505 U.S. 788, ___, 112 S.Ct. 2767, 2777 (1992), teach that a good-faith effort to achieve equality of voting power as nearly as is practicable is required of federal officials in the discharge of responsibilities to conduct and report the census. Pet. App. 34-35.

Applying *Karcher*, the court of appeals held that the burden was initially on plaintiffs to show that the Secretary had failed to make a good-faith effort to achieve a census as accurate as practicable. Pet. App. 36-37. The court held that plaintiffs had met that burden by demonstrating that the

adjusted counts were more accurate, especially with respect to alleviating the differential undercount of minorities, and by showing that the Secretary had declined to adopt the more accurate adjusted counts because he remained uncertain about distributive accuracy at some smaller geographic levels. Pet. App. 38-39.

Following *Karcher*, 462 U.S. at 740, the court of appeals concluded that plaintiffs' proof sufficed to shift the burden to the Secretary to show that use of the less accurate unadjusted census data "(a) furthers a governmental objective that is legitimate, and (b) is essential for the achievement of that objective." Pet. App. 37, 40. The court of appeals remanded the case to permit the Secretary to essay that demonstration.

SUMMARY OF ARGUMENT

Petitioners argue that the court of appeals erred in analyzing the case as one involving fundamental constitutional rights and in following *Karcher* and its antecedents to establish a framework for analysis; petitioners all believe that this case ought properly be analyzed under *Franklin* to determine whether the Secretary's decision was "consistent with the constitutional language and the constitutional goal of equal representation," *Franklin*, 112 S.Ct. at 2777. *See* U.S. Br. 28-32, Wisc. Br. 18-21, 45-46, Okla. Br. i. While the court of appeals was correct, its choice has none of the consequences petitioners suppose; application of the *Franklin* standard leads to the same result as that reached by the court of appeals.

1. The Secretary's decision cannot be justified as "consistent with . . . the constitutional goal of equal representation." In determining which set of census data was more accurate, the Secretary ignored evidence that the adjusted data achieved superior numeric accuracy as irrelevant to the question before him, even though the superior numeric accuracy of the adjusted counts is related, as the Bureau

concluded, to the counts' superior distributive accuracy. The Secretary selected for his comparisons the criterion of distributive accuracy, a selection based on his concerns about the uses of the census data, but he then applied that criterion in ways having nothing to do with uses of the data. He emphasized comparisons having no justification in any constitutional or statutory purpose for which the census is conducted; he treated small errors having little or no impact on those uses as the equivalent of large errors having considerable impact on those uses. After all of those maneuvers, the Secretary achieved a quantum of doubt about the superior distributive accuracy—a quantum that, though unrelated to any uses of census data, allowed the Secretary to invoke the presumption of guideline one and declare the unadjusted counts to be of superior accuracy at all geographic levels and for all purposes. That approach to resolving the question of how best to maximize census accuracy is entirely different from an approach that, without presumptions or artificial analyses or comparisons unrelated to uses of the data, seeks to determine which set of data is more accurate for the purposes for which census data are used. When the district court undertook the latter inquiry, it had no difficulty concluding, as did the Bureau, that the adjusted data were more accurate. The Secretary's contrary approach cannot satisfy the obligation imposed on him by *Franklin*.

2. The court of appeals' analysis leads to the same result. *Karcher* and its antecedents define an obligation of good-faith effort to achieve equality of voting power that the Constitution imposes upon State and local officials. *Montana* supports application of that same obligation to federal actors, though absolute equality of representation between States is precluded by constitutional barriers. The analytic framework of *Karcher* applies to this case. As the court of appeals determined, plaintiffs have shown that the Secretary's decision reflected the absence of a good-faith effort to achieve equality as nearly as practicable. The United States' contention that the

Secretary proceeded in good faith rests on the assumption that the Secretary's decision can be understood as a neutral finding, free of presumptions or artificial analysis, that the unadjusted counts are more accurate for the purposes for which census data are used. The assumption cannot be supported. Moreover, the absence of good faith is readily shown by the context and content of the Secretary's decision.

ARGUMENT

I. THE SECRETARY'S DECISION IS NOT CONSISTENT WITH THE CONSTITUTIONAL LANGUAGE AND THE CONSTITUTIONAL GOAL OF EQUAL REPRESENTATION

The United States asserts that "[t]he Secretary's decision not to undertake an adjustment of the 1990 census figures rested primarily on three determinations[: (1)] . . . that distributive rather than total numeric accuracy should be of paramount importance . . . [; (2)] that, in making his decision, the unadjusted census figures would 'be considered the most accurate count of the population of the United States, at the national, State, and local level, unless an adjusted count is shown to be more accurate.'[; and (3)] that the adjusted figures had not been shown to improve distributive accuracy and that adjustment was therefore not warranted." U.S. Br. 28-29 (footnote omitted). The United States further contends that "[t]he first two determinations are matters of policy that a court may review to the extent of determining whether they are 'consistent with the constitutional language and the constitutional goal of equal representation.'" U.S. Br. 29 (quoting *Franklin*, 112 S.Ct. at 2227). The third determination, according to the United States, "is an exercise of technical judgment . . . reviewable, if at all, only under a deferential 'rational basis' or 'arbitrary and capricious' standard.'" U.S. Br. 29 (footnote omitted).

1. The claim that the Secretary made a critical determination when he selected distributive, rather than numeric, accuracy as the ultimate criterion for deciding whether the census should be adjusted is insupportable. Both the Bureau, which addressed the question of differential undercount because of concerns about its effect on distributive accuracy, and the Secretary (and, for that matter, everyone else who has ever considered the question of census accuracy) agreed that *ultimately* distributive accuracy is the goal of the census. The novelty—and the determinative core—of the Secretary's decision lies elsewhere. That decision rests on the assumption that evidence of improved numeric accuracy is *irrelevant* to determining whether distributive accuracy has been improved and on an approach to resolving questions of distributive accuracy that examines all possible comparisons, regardless of relation to uses of census data, and measures error by the number of units affected rather than the proportional sizes of the errors. The determination that numeric accuracy is irrelevant is without precedent in the history of the census.[22] Moreover, it cannot be justified as

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[22] The notion that only distributive accuracy is important and that numeric accuracy is irrelevant is so strange that the advocates who press it before this Court find it impossible to avoid contradicting themselves. The United States says, "Even a dramatic undercounting of the total population would not be inconsistent with the goal of fair apportionment if each State's share was accurately determined." U.S. Br. 30-31. In the same vein, Wisconsin writes:

> A census which achieves "true" numeric accuracy in the count of the national population has no inherent superiority over one which does not. What makes one set of numbers constitutionally superior is its ability to distribute correctly a given national population among the states. If this occurs, it is constitutionally irrelevant whether the national count is half or double its "true" level or somewhere in between.

Wisc. Br. 36. Yet both petitioners find highly relevant the Bureau's "success in counting 98.4% of the population", U.S. Br. 23; *see also* Wisc.

"consonant with, though not dictated by, the text and history of the Constitution," *Franklin*, 112 S.Ct. at 2778, *cf.* U.S. Br. 29 n.21, for the Secretary's indifference to numeric accuracy transgresses both the plain language of the Constitution, Art. I, 2, § Cl. 3, and the mechanism for representation to which that language relates.[23] The Secretary's determination of an

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Br. 5. If numeric accuracy is presumptively "constitutionally irrelevant," as petitioners claim, a count of 98.4% of the population is not presumptively "constitutionally superior" to a count of 50% or 200% of the national population. Obviously, neither petitioner really believes that numeric accuracy is completely irrelevant, and indeed it is not.

[23] The Secretary's indifference to numeric accuracy rests on the premise that "[e]ven a dramatic undercounting of the total population would not be inconsistent with the goal of fair apportionment if each State's share was accurately determined." U.S. Br. 30-31. Wisconsin puts it only slightly differently, "The same percentage distribution of the national population among the states will result in the same apportionment, regardless of the level of the national population." Wisc. Br. 36. Neither statement is true as a general proposition; neither reckons with the facts that the Constitution, Art. I, § 2, Cl. 3, requires that congressional districts have populations of no less than 30,000; that it requires that whole numbers of seats be apportioned; and that it does not express a preference for a particular method of apportionment. Thus, neither statement holds for the results of the first decennial census in 1790 and the first census-based apportionment in 1792. At that time, congressional districts close in size to the constitutional minimum (30,000) were common. For example, Rhode Island, with a population of 68,446, received two seats in the House of Representatives. *See* M. Balinski & H. Young, *Fair Representation* 158 (1982). A more severe, though evenly distributed undercount—of 13% or more—would have reduced Rhode Island's population below 60,000 and necessarily eliminated its second seat. But under the method of apportionment actually used, *see Montana*, 503 U.S. at 448-450, larger states' congressional delegations would not have been halved. New Jersey, with a population of 179,570, received five seats in the 1792 apportionment. Had an evenly distributed undercount reduced Rhode Island to one seat, no method of apportionment could have preserved the 5:2 ratio between New Jersey's and Rhode Island's delegations, since the Constitution requires allocation of whole numbers of seats. Finally, the 1792 apportionment was conducted under Jefferson's

approach to analyzing distributive accuracy is so extraordinary that it was repudiated by the United States in the court of appeals.

Distributive accuracy is an appropriate criterion for judging census accuracy because it calls attention to a concern with the uses to which census data are put. The Secretary himself invoked that justification in explaining his preference for distributive accuracy. But the Secretary's ensuing analyses of "distributive accuracy" are unrelated to any uses of census data. Nowhere in his decision does the Secretary even attempt to demonstrate that the errors created by adjustment would have adversely affected the *usefulness* of census data. In particular, the Secretary never considered which set of counts would do most to ensure fair representation. The Secretary's determination of an approach to the question of distributive accuracy—an approach conceded not to have been valid—cannot be vindicated as consistent with the constitutional goal of equal representation.

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method (the method of greatest divisors): under that method, a common divisor is first selected (in 1792, the divisor was 33,000); then, each State's enumerated population is divided by the divisor and each State's number of Representatives is the resulting whole number, fractions being ignored, *id.* at 449-450. A State would thus have eight seats if the ratio of its reported population to the selected divisor were anywhere between 8.99 and 8.00, but would fall to seven seats if the ratio dropped from 8.00 to 7.99. With the same divisor, then, a *modest*, evenly distributed undercount could alter the apportionment of seats in the House. Only under a method of apportionment such as the method of equal proportions (Hill method) is it true (and then only for congressional districts much larger than 30,000) that an evenly distributed undercount will not change the apportionment of Representatives. But that method is only one of several Congress has from time to time selected. *Id.* at 447-456. The Secretary's determination that numeric accuracy is irrelevant because equivalent distributions *always* produce the same apportionment rests on a supposed axiom about constitutional apportionment that is in fact not generally true; the Secretary's determination is not "consonant with . . . the text and history of the Constitution."

2. The Secretary's second determination, according to the United States, was to "adopt[] a working hypothesis that unadjusted figures derived from the 1990 census would be treated as the most accurate unless alternative numbers were shown to be better." U.S. Br. 31-32. The United States, *id.* 31, argues that use of that hypothesis was "consonant with, though not dictated by, the text and history of the Constitution," *Franklin,* 112 S. Ct. at 2778, "[b]ecause unadjusted headcounts had been used for 200 years". The premise of the argument is simply wrong, *supra*, pages 4-5. In any event, the census is a complex system of balancing errors that cannot meaningfully be described as a "headcount." *Supra*, pages 5-11. Moreover, what the United States must defend is not merely a presumption that the uncorrected counts are more accurate but a presumption that incorporates the Secretary's approach to distributive accuracy —and that approach is without precedent in the 200 years of the United States census, was described by the Secretary's own expert witness at trial as "borderline unreasonable," and has been deprecated by even the United States as "not a good way" of analyzing accuracy.

The United States makes two further points in connection with the Secretary's "second determination." The United States argues that the "constitutional goal of equal representation" cannot "plausibly be thought to require the Secretary to use adjusted figures that he had not found to be more accurate than the unadjusted numbers in achieving that goal." U.S. Br. 32. But the Secretary never considered analyses bearing on the superior accuracy of the adjusted counts for apportionment and districting; instead, he focused on applications of the criterion of distributive accuracy that were unrelated to any use of census data. Thus, his analysis ignored the impact of the adjustment decision on the goal of equal representation.

The United States also argues that the Secretary "affirmatively concluded" that "'evidence provided by the Census Bureau tends to support the superior distributive accuracy of the actual enumeration.'" U.S. Br. 32 (quoting Pet. App. 185). The evidence in question is the same set of analyses for states, cities and counties, Pet. App. 191, already discussed, *supra*, pages 39-42. The Secretary's "affirmative conclu[sion]" can be supported only by adoption of the approach to distributive accuracy he followed. Following any other approach, the Bureau's evidence (as the Bureau explained) supports the superior distributive accuracy of the adjusted counts.

3. The United States contends that the Secretary's "third determination"—that the adjusted data were less accurate than the unadjusted—can be reviewed only under a deferential standard because of the supposedly highly technical nature of the decision. U.S. Br. 33. The United States cites in support of that argument a series of cases restating the courts' customary hesitation to review the merits of agencies' resolutions of scientific disputes. U.S. Br. 34. Without any supportive authority, the United States then announces, "That respondents' attack on the Secretary's decision is framed as a constitutional challenge does not detract from the respect for institutional competence that underlies the rule of deference to an expert agency's technical judgments." *Ibid.*

In the first place, there is nothing highly technical about the critical question of the Secretary's approach to distributive accuracy. The Secretary himself observed that:

> "The choice of a loss function is not scientific. It is usually made on the basis of convenience or tradition."

Pet. App. 188. The United States concedes that the Secretary's choice of an approach to distributive accuracy as the basis for his interpretation of the Bureau's loss function analyses is susceptible to judicial review to determine whether

it is consistent with the constitutional language and the constitutional goal of equal representation. If his approach cannot be so supported, the Secretary's "working hypothesis" concerning the superiority of the unadjusted counts is insufficient to support a conclusion that the unadjusted counts are more accurate under any different approach to distributive accuracy. At the very least, then, the remand ordered by the court of appeals would be appropriate to permit the Secretary to redetermine the comparative accuracy of the two counts under a constitutionally permissible definition of distributive accuracy.

In the second place, the United States has offered neither authority nor justification for the radical conclusion that at a certain level of technical complexity issues of constitutional magnitude may be determined by agencies and then shielded from all but deferential judicial review. None of the five cases cited by the United States for the proposition that courts must defer to technical determinations by federal agencies, U.S. Br. at 34, involved constitutional claims. All arose under federal statutes—the APA and the National Environmental Policy Act of 1969—that authorize only limited judicial review of agency decisions.[24] Where a claim arises under the Constitution,

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[24] Four of the cited decisions explicitly identify the APA, 5 U.S.C. § 706(2)(A), as both the source of and the limitation on the court's power to review the agency's action. *Thomas Jefferson University v. Shalala*, ___ U.S. ___, 114 S.Ct. 2381, 2386-2387 (1994) (interpretation by Secretary of Health and Human Services of agency regulations governing Medicare reimbursements to teaching hospitals); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376 & n.21 (1989) (determination by Army Corps of Engineers not to file supplemental environmental impact statement); *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 90 & n.3 (1983) (Nuclear Regulatory Commission decision concerning presumed environmental impact of storage of certain nuclear wastes and application of that presumption to nuclear power plant licensing); *International Fabricare Institute v. Environmental Protection Agency*, 972 F.2d 384, 389 (D.C. Cir. 1992) (regulation of drinking water

however, neither the text of Article III nor the structure of the overall scheme of government suggests that judicial authority diminishes as the complexity of subject matter increases. Certainly the United States cites no case that intimates, much less holds, that fundamental constitutional rights are attenuated when the processes requisite for their vindication involve a degree of scientific or technical sophistication. Indeed, this Court has as readily invoked the aid of statistical analysis in addressing constitutional claims, *e.g.*, *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 697-698, 700-703 (1989); *Castaneda v. Partida*, 430 U.S. 482, 496 nn.16-18 (1977), as it has undertaken to gloss the mathematics of apportionment, *Montana*, 503 U.S. at 455-456, 461-463.

The most profound flaw in the United States' argument, however, has nothing to do with institutional relations *between* the Judiciary and the Executive and everything to do with institutional relations *within* the Executive. Resting its argument on cases reflecting judicial deference toward, for example, the expertise of the Nuclear Regulatory Commission concerning nuclear waste and the expertise of the Environmental Protection Agency concerning drinking water contaminants, the United States suggests that comparable deference is due the "technical expertise" of the Commerce Department officials who decided against adjustment. U.S. Br. 33-34. But "technical expertise" with respect to the census rests within the Bureau. The Bureau exercised that expertise in designing, implementing, reviewing and recommending use of the PES-based adjustment. The Secretary's decision, without contributions from nor review by the expert Bureau, was made in derogation of that technical expertise. Judicial

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contaminants). The fifth case, *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), arose under Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C), which similarly limits judicial review of agency action. 427 U.S. at 410 n.21.

review of the Secretary's decision should not be impeded by a respect for expertise that the Secretary himself overrode.

As the agency responsible for the very data underlying the allocation of political power, the Bureau has a unique place in the Executive branch. If the source of those data is tainted, the legitimacy of the allocation of power and thus of the uses of that power are called into question.

> "There is a need to protect the Bureau of the Census against politicization. The potential for polluting a highly technical, objective statistical procedure with political bias is real and the implications for congressional reapportionment and a host of Federal assistance programs could be dramatic."

The Census Reform Act: Hearings on H.R. 8871 Before the Subcommittee on Census and Population of the House Committee on Post Office and Civil Service, 95th Cong., 1st Sess. 4-5 (1977) (statement of Rep. Leach). A. Ross Eckler, who served as Director of the Bureau from 1965 to 1969, has noted that, "as a rule [the Bureau] has been given a good deal of independence in carrying out its tasks." A. Ross Eckler, *The Bureau of the Census* 129-130 (1972).

The rule changed in 1987. A scholarly account of the adjustment controversy puts it this way:

> "What was radically different about the 1990-1991 adjustment decision was that the Department of Commerce took it away from the bureau and held onto it tightly. Starting in 1987 when the undersecretary announced unilaterally that there would be no adjustment in 1990, the department retained control over the decision; the department "undelegated" it from the bureau. . . . [F]or decades census officials had been making decisions with equally weighty numerical implications. Census bureau officials had made those decisions responsibly."

Harvey M. Choldin, *Looking for the Last Percent: The Controversy over Census Undercounts* 237 (1994). Former Bureau Director Bryant, citing and agreeing with Dr. Choldin, describes the events of the period as the "[D]epartment's 'takeover' of the Census Bureau." Barbara E. Bryant, *Moving Power and Money: The Politics of Census Taking* 158 (1995).

Against that backdrop, rote invocation of the doctrine of deference to agency expertise rings hollow. The principle that resolution of "issues requir[ing] a high level of technical expertise . . . is properly left to the informed discretion of the responsible federal agencies", *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976), bears less meaningfully on judicial review of the Secretary's decision than does the principle that "expertise cannot be used as a cloak for fiat judgements." *Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission*, 926 F.2d 1206, 1211 (D.C. Cir. 1991).

The United States also argues that, absent a uniform rule of deference, cases concerning census accuracy might produce conflicting findings of fact among district courts and force appellate courts to act as fact-finders. *Id.* 34-35. The argument proves far too much. The United States itself concedes that "[t]he courts would be open to consider" a claim of "[i]ntentional undercounting of racial minorities in the conduct of the census". *Id.* 45-46. Yet such a claim, which the United States recognizes would be analyzed without a framework of deference, *id.* 46, could easily arise before different district courts, which could arrive at different resolutions based upon different findings of fact. A variety of devices—including certification of a nationwide class, Fed. R. Civ. P. 23; certification to the Judicial Panel on Multi-District Litigation, 28 U.S.C. § 1407; orders of transfer among district courts, 28 U.S.C. § 1404; and deference among courts of coordinate jurisdiction—are available to resolve such conflicts. An extraordinary new rule of deference to such agency

determinations as may be simultaneously susceptible to challenge in different districts is unwarranted.

4. As further support for its contention that the Secretary's ultimate determination concerning the accuracy of the adjusted and unadjusted data should not be overturned, the United States argues that "the formulation and evaluation of the proposed adjustment involved a series of complex processes and assumptions in a highly technical area" and that "[i]n the Secretary's view . . . the analysis tended to show that the adjusted figures were less accurate than the unadjusted count at every level from the state level down." U.S. Br. 36. It is true that the *Bureau's* work on the adjustment involved technical decisions. But it is not true that the Secretary's decision turned on technical issues. His decision turned on particular uses of the concept of distributive accuracy, uses readily susceptible to non-expert review.[25] The Secretary's "view . . . that the adjusted figures were less accurate" reflected no more than the conclusion of his flawed approach to analyzing accuracy combined with the iron presumption of guideline one.

The United States further argues that "[t]here were . . . substantial uncertainties in the record that weighed against a determination that the particular adjustment under consideration was distinctly meritorious and superior to the adjusted figures", *id.* 36, a statement developed by showing that, at several points, decisions made in planning the adjustment process could have been made otherwise and that,

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[25] It could scarcely be otherwise. Robert A. Mosbacher, the Secretary of Commerce who made and announced the decision against adjustment in July 1991, was "not a statistician," as he forthrightly put it in announcing his decision. Pet. App. 139. That the Secretary of Commerce removed the decision on adjustment from the expert agency, the Census Bureau, does not mean that the non-expert Secretary, having rejected the expert recommendation of the Bureau's director, can continue to characterize the decision as "highly technical."

if made otherwise, would have yielded different results (conceivably affecting the apportionment of the House of Representatives). The argument is premised on a *non sequitur*. Even supposing the United States to have shown that "the particular adjustment under consideration was [not] distinctly meritorious," *i.e.*, that other adjustments were possible and might even be better, it does not follow that the adjusted data in question are worse than the unadjusted data. On the question of whether an elephant is or is not bigger than a horse, one would suppose that evidence that a whale is bigger than either is not probative.

But it is a noteworthy fact about the evidence the United States cites—from Dr. Wachter's test of "five alternative adjustment calculations" through the Bureau's 1992 revised corrected figures (based on a different post-stratification and no smoothing)—that *every* approach to adjustment finds the uncorrected enumeration to have erroneously shifted a seat in the House from Wisconsin to California.[26] DX 39 at 24-25 and Table 2.1. Neither the Secretary in his decision nor the United States before this Court, denies that Wisconsin enjoys an additional seat in Congress, and California is deprived of one, solely because of deficiencies in the uncorrected enumeration.[27]

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[26] The Bureau's loss function analysis shows that the unadjusted counts malapportion two seats more in the House of Representatives than do the adjusted. Tr. 1267. The United States itself acknowledges that the revised corrected figures developed by the Bureau in 1992 show a shift of the same seat from Wisconsin to California. U.S. Br. 18. *See also* Pet. App. 220 (use of different smoothing model showed shift of seat from Wisconsin to California).

[27] The United States suggests that none of the plaintiffs have standing to assert constitutional claims based on the malapportionment of Representatives among the States, because California chose not to appeal from the district court's decision. U.S. Br. 19 n.16. But Arizona, another State that gains a Representative if the adjusted figures are used, is a

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE SECRETARY'S DECISION WAS SUBJECT TO STRICT SCRUTINY, THAT PLAINTIFFS HAD SHOWN THAT THE DECISION DID NOT REFLECT A GOOD FAITH EFFORT TO MAXIMIZE CENSUS ACCURACY AND THAT THE CASE SHOULD BE REMANDED TO PERMIT THE UNITED STATES AN OPPORTUNITY TO SHOW A COMPELLING NECESSITY TO USE LESS ACCURATE DATA FOR THE ATTAINMENT OF SOME LEGITIMATE OBJECTIVE

1. The United States argues that the court of appeals erred in applying cases such as *Karcher* to "the Executive Branch's

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respondent. Moreover, individual voters who are residents of California have standing based on the malapportionment of the House, in which Representatives "'represent the people as individuals'", *Montana*, 503 U.S. at 459-460 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7-8, 14 (1964)). The United States questions whether the State is not the proper party to assert a challenge to the apportionments. U.S. Br. 19 n.16. The suggestion is that a State could limit equal representation rights for its residents by giving up a Representative to which its residents were entitled and leaving them with larger congressional districts (and more diluted votes) than their constitutional entitlement would provide. The authority just cited rebuts that suggestion. The United States' further suggestion that it makes a difference that the State commenced but then discontinued its participation would have the odd consequence of putting residents in a *worse* position if their State joined their suit than if the State never participated at all. Finally, once it is established that one party has standing to challenge the apportionment, further analysis is unnecessary, since any adjustment must be nationwide. *See id.* at 35. The United States also concedes, *id.* at 30 n.23, that other plaintiffs have standing to challenge the Secretary's decision due to injuries based upon the distribution of federal funds. That not all of the plaintiffs before this Court can assert every claim before the Court is of no practical significance, since the decennial census must comprise just one set of figures whether used for apportionment, redistricting or allocation of funds.

conduct of the census and certification of state population figures" because of constitutional constraints on the apportionment that prevent equalization of congressional district sizes among states. U.S. Br. 40 & n.30.[28] The court of appeals, however, explicitly recognized that, because of those constitutional constraints—that each State be allotted at least one Representative, that no district be smaller than 30,000 people, and that congressional districts not cross State boundaries—precise equality of voting power cannot be achieved for the nation as a whole. Pet. App. 35. But, the court, relying on *Montana*, wrote, "[t]hat the goal of precise equality cannot be achieved nationwide on account of those constraints . . . does not relieve the federal government of the obligation to make a good-faith effort to achieve voting power equality 'as nearly as is practicable.'" *Ibid.* (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964)).

The court of appeals' reliance on *Montana* was correct. There, having determined that the case was justiciable, the Court proceeded to analyze Montana's claim in light of *Wesberry*. The Court's rejection of Montana's challenge was based not on the conclusion that the goal of equal representation is irrelevant to the apportionment of the House but on the determination that the facts in *Montana* did not

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[28] The United States also suggests that *Karcher* does not apply because of the "technical complexity of the enumeration process", U.S. Br. 40 n.30; but that "technical complexity" refers to the work of the Bureau, not the decision of the Secretary, *supra*, p. 61. The United States also argues that the constitutional grant of authority to Congress to dictate the manner of the census "suggests that a broader range of legitimate governmental objectives may be available to justify use of census figures that do not maximize population equality than would be true of decisions made in the state districting context." *Ibid.* As the United States recognizes, *ibid.*, *Karcher* already qualifies the obligation to maximize equal representation in terms of practicability, 462 U.S. at 730, so the United States' objection cannot be that the *Karcher* standard fails to take practicability into consideration.

"establish a violation of the *Wesberry* standard." *Montana*, 503 U.S. at 461. In particular, the Court observed that the constitutional constraints on apportionment "make[] it virtually impossible to have the same size district in any pair of States, let alone all 50." *Id.* at 463.[29] Yet the Court embarked on a detailed analysis of the arguments, based on

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[29] Montana challenged the use in apportioning the House of the method of equal proportions (Hill method), arguing that equal representation was better served by the method of the harmonic mean (Dean method); had the Dean method been used, a seat in the House would have shifted from Washington to Montana. *Montana*, 503 U.S. at 460-461. With reapportionment after the 1990 census, the average congressional district size nationally ("ideal district size") was 572,466 persons. The actual apportionment, using the Hill method, gave Montana a single district, with a population of 803,655, and gave Washington an average district of 543,105. The absolute deviation from ideal district size for Montana was thus 231,189 and for Washington 29,361. Use of the Dean method would have minimized absolute deviations from ideal district size; that is, the sum of the differences between the average and the ideal district size in the two States would have been reduced. *Id.* at 461. But *relative deviations* from ideal district size (the ratio of the absolute difference from the ideal to the average district size within the state) would have been increased for both states; the Hill method minimized *those* deviations. *Id.* at 462 & n.40. It was with respect to the choice between a method that would minimize absolute deviations and a method that would minimize relative deviations that the *Montana* court wrote: "The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course." *Id.* at 463. The United States now suggests that that sentence was meant generally to counsel judicial abstinence when faced with claims concerning Section 2, Clause 3 of Article I of the Constitution. U.S. Br. 26-27; *see also* Wisc. Br. 21. But if the Court had had such a broad proposition in mind, it would never have embarked on the detailed discussion of the competing arguments, based on equal representation, in favor of either method; rather, the Court would have ended the discussion at the point of establishing that, with the apportionment of the House at issue, the goal of "'precise mathematical equality'" in representation is "illusory for the Nation as a whole." *Id.* at 463 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-531 (1969)).

equal representation, favoring the method of apportionment used and that Montana proposed. *Id.* at 459-463. The Court also satisfied itself that Congress' choice of a method had been made in an apparently good-faith attempt to implement the Constitution's purpose. *Id.* at 464. The Court reaffirmed that approach in *Franklin*, when, citing *Montana*, it reviewed the Secretary's decision concerning allocation to the states of overseas personnel to determine whether it was "consistent with the constitutional language and the constitutional goal of equal representation." *Franklin*, 112 S.Ct. at 2777.

On the basis of this Court's decision in *Montana*, the court of appeals "conclude[d] that the federal government, no less than the states, is required to make a good-faith effort to achieve the Constitution's plain objective of equal representation for equal numbers of people." Pet. App. 35. The Secretary's failure to select as the decennial census the counts that would in fact promote that goal would therefore subject his decision to strict scrutiny, both because the decision impaired a fundamental right and because it impaired that right more severely for members of minority groups, a "suspect" class.

2. The United States next argues that, assuming application of *Karcher*, the court of appeals nonetheless erred in determining that an absence of good faith had been shown.

As evidence of good faith, the United States points first to "the success of the Bureau in counting 98.4% of the nation's population," U.S. Br. 41. The United States misapprehends the thrust of respondents' claim and of the court of appeals' decision. Respondents have never challenged the acumen nor the *bona fides* of the Bureau: there is no doubt that the *Bureau* made a good-faith effort to achieve the most accurate count practicable, and no small part of that effort was reflected in the recommendation of the Bureau's Director that the census counts be adjusted. Respondents' challenge, however, is to the *Secretary's* decision. The

question of whether the Secretary rendered his decision in favor of one set of data in good faith is not answered by examination of the circumstances under which the two sets of data came into existence. There is no inconsistency in asserting that each of two sets of data was created (by the same agency, after all) in a good-faith effort to achieve population equality but that the decision between them was not made in pursuit of the same good-faith effort.

Second, the United States argues that, since "[t]he Constitution allows for varying approaches to the conduct of the census and varying measures of accuracy and equity", U.S. Br. 43, the Secretary's choice of one measure of accuracy does not demonstrate an absence of good faith merely because another measure might have been chosen. Respondents do not advocate a particular approach to the conduct of the census, nor do they deny that there is considerable choice afforded the Secretary among measures of accuracy and equity. But the Secretary's choice of a measure of accuracy that is concededly "not a good way" of measuring accuracy and in the face of evidence that application of the measure actually disserves the goal of equal representation is not an "apparently good-faith choice of a method", U.S. Br. 43 (quoting *Montana*, 503 U.S. at 464) for determining the set of data to be reported as the decennial census.[30]

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[30] The United States also argues that the court of appeals' decision opens the door to a host of challenges to decisions made in planning and conducting the census. U.S. Br. 41 & n.31. As the list of cases cited by the United States, *id.* 41 n.31, shows, when such cases have been brought in the past, the United States has invariably prevailed. Regardless of the court of appeals' decision in this case, it is unlikely that litigants challenging census-taking decisions in the future will enjoy any greater success. With or without the court of appeals' decision, a litigant must show that a proposed change in the planning and conduct of the census will in fact increase accuracy across the nation. (As the United States correctly points out, U.S. Br. 35, even a regional change in census

The United States complains, U.S. Br. 44-45, that the court of appeals expressed, but failed to justify, a preference for numeric accuracy over distributive accuracy. The court of appeals expressed no such preference. Rather, the court of appeals correctly described the Secretary's decision as (1) rejecting use of adjusted data that would indisputably ameliorate the differential undercount, and (2) basing that rejection on the Secretary's assertion that, under the approach to "distributive accuracy" he adopted, he was not convinced the adjusted counts would achieve superior distributive accuracy. Differential undercounting has *distributive* consequences, adversely affecting allocation of representation and funding for places with disproportionately minority populations; that is why the Bureau worried about the problem of differential undercounting and devoted so much energy to solving it. It is surely fair to say, as the court of appeals did, that, when the Bureau presented the Secretary with counts that ameliorated the differential undercount, he "decline[d] to make the generally improving adjustment that would lessen the disproportionate undercounting of minorities" if there were any distributive consequence with respect to which an adjusted census "would be different from . . . , although just as accurate" as the unadjusted. Pet. App. 38. The Secretary, acknowledging that the adjusted data had ameliorated the differential undercount but refusing to

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procedures cannot be analyzed without taking into consideration its impact nationally.) Because census-taking involves the complex balancing of error, a mere demonstration that a particular technique will enhance accuracy with respect to one aspect of the count is not a demonstration that overall accuracy will be improved. Only a systematic demonstration of a technique to improve overall accuracy would underpin a successful claim under the court of appeals' analysis. And only the Bureau itself is ever likely to be in a position to make such a demonstration. The unique circumstances present here are most unlikely to recur: the United States' invitation to protect it from the inconvenience of lawsuits at the expense of diminished equality in representation should be declined.

recognize the distributive impact of that undercount, subsumed all evidence of improved accuracy for "racial and ethnic populations" under the concept of numeric accuracy, *see* Pet. App. 146-147, 158, 160, 165, 182-185, 200-201, and dismissed that evidence as "not relevant to the determination of distributive accuracy." Pet. App. 201.

With respect to the United States' final argument on good faith, U.S. Br. 44, the district court's findings are not "enigmatic," *supra*, pages 46-47. The district court found that the adjusted counts had been shown to be more accurate for most purposes for which the census is used but declined to characterize the Secretary's contrary conclusion as "arbitrary or capricious." That court examined the Secretary's decision only to determine whether it could be supported under the broad discretion afforded by the Secretary's own guidelines. From the premises that the Secretary selected the less accurate data as the census but that his guidelines permitted him to do so it hardly follows that the Secretary's decision was necessarily the product of a good-faith effort to maximize census accuracy.

The United States scarcely reckons with the additional bases for the court of appeals' determination that the Secretary's decision did not reflect "the required good-faith effort", Pet. App. 39. The court of appeals observed that the Secretary had sought to justify his decision against adjustment in part with the ostensible concern that using an adjustment admittedly not the result of political manipulation might nonetheless open the door to such manipulation in future censuses and in part with the opinion (not shared by the Bureau) that the use of statistical processes would discourage State cooperation with future census efforts. Pet. App. 38. The United States admits the Secretary's reliance on those factors, then describes them as "not central to this case for present purposes" and finally explains that the Secretary's concerns were "not irrelevant to the overall, long-term accuracy of the

census." U.S. Br. 29 n.21. The speculative character of the Secretary's ostensible concerns and their attenuated relationship ("not irrelevant") to any interest in census accuracy, taken together with the Secretary's readiness to invoke any available argument against adjustment, help establish that the decision against adjustment was not made in the interest of maximizing census accuracy but on the basis of an unshakable predisposition. As the court of appeals observed, the Secretary was aware of but indifferent to the long, well-documented history of differential undercount and Bureau attempts to reduce it. Pet. App. 39. The Secretary's effectively irrebuttable presumption against adjustment, his appointments to the Special Advisory Panel, his rejection of Bureau expertise, his retention of outside experts for the specific purpose of designing a defense of his decision, all testify, as does the decision itself, to the absence of a good-faith effort to achieve the most accurate census counts practicable.

3. The United States asserts that "[t]he court of appeals was simply wrong" in determining that the Secretary's decision was subject to heightened scrutiny without proof of discriminatory purpose. U.S. Br. 45. The United States, relying on *Washington v. Davis*, 426 U.S. 229, 239-245 (1976), asserts that "establishment of an equal protection violation based upon racial discrimination requires proof of a discriminatory *purpose*." U.S. Br. 45 (emphasis in original). But the court of appeals, in an analysis not discussed by the United States, explained that, "[a]lthough for most types of equal protection claims, a plaintiff must show the government's discrimination was intentional, the Supreme Court has not imposed such a requirement in any of the cases involving apportionment." Pet. App. 35-36 (citations omitted). The court of appeals quoted the opinion in *Tucker v. United States Department of Commerce*, 958 F.2d 1411, 1414 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 407 (1992), which points out that malapportionment cases do not require proof

of intent, though other equal protection cases do. "The purpose of *that* requirement [of proof of intent] is to prevent the concept of equal protection from being used to invalidate governmental policies that just happen to bear more heavily against a vulnerable group, whereas the reapportionment cases vindicate a right that the Supreme Court has found to be implicit in the Constitution to an apportionment mechanism that will, so far as possible give each person's vote the same weight in an election." Pet. App. 36. The effect of the Secretary's decision is that, in general, the votes of minority citizens are given less weight than those of non-minority citizens. What determines the burden of proof is the fact that this is a case concerning electoral representation, not the fact that the disparate effect occurs along racial lines.

The court of appeals explained, "In general, if a law alleged to infringe a certain right directly would require a heightened degree of scrutiny, heightened scrutiny should also be given when the law is alleged to infringe that right discriminatorily." Pet. App. 33 (citations omitted). The Secretary's choice of a count generally less accurate would thus trigger strict scrutiny because of the adverse impact on equal representation rights. Even were it assumed that the Secretary was genuinely in doubt about the comparative accuracy of the two counts or found the two counts equally erroneous, his choice of the count in which inaccuracy is systematically concentrated among minorities instead of the count in which inaccuracy is non-systematically distributed throughout the population would warrant strict scrutiny. *Cf. Karcher*, 462 U.S. at 752-755 (Stevens, J., concurring) (districting plan that achieves equipopulousness may nonetheless violate right of equal representation through adverse impact on minorities together with departures from neutral criteria). The degree of scrutiny, and the burden of proof, flows from the nature of the right (equal representation), not the basis on which the infringement occurs. The United States' argument that there is no proof of

discriminatory animus, U.S. Br. 45-50, is therefore beside the point.

The United States also argues that there is no proof that members of minority groups are differentially distributed and that the consequence of differential undercounting of minorities would therefore be to deprive areas in which minorities are concentrated of political representation and funding. U.S. Br. 48. But "[i]t is absurd to suggest that a disproportionate loss of political representation will not follow in the wake of a miscount." Pet. App. 128-129. That was the very reason the Bureau undertook its laborious, decade-long effort to ameliorate the differential undercount—precisely because of the impact of that undercount on the areas in which minorities are concentrated. *See* Jt. App. 79; Tr. 1277. In any event, plaintiffs demonstrated at trial both that undercount was, as expected, more severe in those states with greater concentrations of minority residents and that the effect of differential undercounting was to deprive residents of equal representation. *Supra*, pages 26-28.

III. ADJUSTMENT OF THE CENSUS IS NOT PROHIBITED BY 13 U.S.C. § 195

1. The States of Wisconsin and Oklahoma argue at length that any adjustment of the census is barred by 13 U.S.C. § 195, which provides:

> "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

See Wisc. Br. 31-33, Okla. Br. 7-18. As pointed out by the United States in its Opposition to State Petitioners' Motion to Extend Time for Oral Argument and for Divided Argument, that argument was not presented in either States' Petition for Writ of Certiorari and is not encompassed by any

question with respect to which the Court has granted certiorari. *See* Federal Petitioners' Opposition to State Petitioners' Motion to Extend Time for Oral Argument and for Divided Argument ("U.S. Opp."). The question, therefore, is not properly before the Court. The State petitioners should not be allowed argument on, and the respondents should not be required to address, this issue. The State petitioners' tactics amount to "the practice of smuggling additional questions into a case after [the Court] grant[ed] certiorari." *Irvine v. California*, 347 U.S. 128, 129 (1954).

Supreme Court Rule 14.1(a) clearly admonishes that "[o]nly questions set forth in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). It is not enough that a question be "related" to or "complementary" to the question presented. Stern, Gressman, et al., *Supreme Court Practice* § 6.25(f) at 338 (7th ed. 1993). In order to be considered "fairly included," the question must be "predicate to an intelligent resolution of the question on which [the Court] has granted certiorari." *Vance v. Terrazas*, 444 U.S. 252, 258-259 n.5 (1980).

The question of whether section 195 prohibits the use of statistical sampling in determining the census figures for apportioning Representatives is separate and distinct from the question of whether the decision of the Secretary not to correct for the differential undercount of minorities was consistent with the language of the Constitution. *See* State of Wisconsin, Petition for Writ of Certiorari, at i (Question Presented); State of Oklahoma, Petition for Writ of Certiorari, at i (Questions Presented). In fact, as noted by the United States, addition of this question will only serve to multiply the issues before the Court, as the Court will "be required to determine whether such a prohibition [is] itself consistent with the Constitution." U.S. Opp. at 4.

2. In any event, the argument presented by Wisconsin and Oklahoma is incorrect and should be rejected.

As the court of appeals explained, Pet. App. 23-26, section 195 must be read in conjunction with 13 U.S.C. § 141, which provides in pertinent part:

> "The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date', in such form and content as he may determine, *including the use of sampling procedures and special surveys*. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary."

13 U.S.C. § 141(a) (emphasis added). Section 141(a), as opposed to section 195, is the basis for the Secretary's authority to conduct the decennial census. As such, Congress has specifically authorized "the use of sampling procedures and special surveys" to be used for the "census of population." *Ibid.*

Interpreting this language, the court of appeals not only concluded that Congress authorized the use of statistical imputation in determining the census figures but *encouraged* it. Pet. App. at 107-110. As Wisconsin and Oklahoma admit, the same conclusion has been reached by several courts before. *See Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980); *Young v. Klutznick*, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980), *rev'd on other grounds*, 642 F.2d 617 (6th Cir. 1981). The United States too "agree[s] with the court of appeals that the Constitution and the Census Act do not bar the use of statistical sampling in conducting the decennial census." U.S. Br. 26.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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